JOURNAL

ISSUED BY

AMERICAN BAR ASSOCIATION

MAY, 1921

Rental Legislation in Illinois

The movement for rental legislation in Illinois has been second only to that in New York in vigor and attainment of results. The General Assembly has recently passed four measures which were recommended by the Illinois Housing and Building Commission early in January in order to meet the emergency due to the shortage of houses. Each of these bills contains an emergency clause bringing it into immediate effect. They are as follows:

A bill authorizing courts to grant a stay of execution not exceeding six months in forcible entry and detainer proceedings, the court determining the compensation which the tenant is to pay during the period of the stay, and the tenant to give bond or to pay the total amount of rental for the period of the stay, such legislation to be effective only until July 1, 1923.

A similar bill authorizing stay of execution in ejectment cases, such legislation to be effective only until July 1, 1923.

A bill repealing the double penalty for holding over beyond the termination of the tenancy, so far as it affects residence property, such repeal to be effective only until July 1, 1923.

Legislation providing for jury trial irrespective of waiver of such trial contained in any lease or contract with respect to premises used for residence purposes.

The Illinois Housing and Building Commission also recommended legislation authorizing cities, towns and villages of over twenty-five thousand inhabitants to create rental commissions for the fixing of rates of rental. The terms of this bill also limit its operation to July 1, 1923. It has not yet been passed by either House of the General Assembly.

The Illinois Housing and Building Commission further recommended a thorough investigation of combinations and agreements in restriction of building operations, and such an investigation is now being conducted in Chicago by a joint legislative committee, of which Senator John Dailey is chairman.

To Address Cincinnati Meeting

Sir John Simon of London, formerly Solicitor General, Attorney General and Secretary of State for Home Affairs, has cabled acceptance of the invitation to attend and address the Cincinnati meeting of the American Bar Association. Sir John comes to America as the guest of the Canadian Bar Association and will deliver the principal address at its meeting during the week following the meeting of the American Bar Association. A detailed program of the Cincinnati meeting will appear in the June issue of the Journal.

Improving Federal Judicial System

"The Lawyers' Committee for improving the Federal Judicial System" has secured the introduction in Congress of a concurrent resolution providing for a joint committee, to be composed of five Senators and seven Representatives, "to consider what legislation in relation to the courts of the United States, the procedure therein, and the judges thereof, would tend to improve the administration of justice and to report to the Congress a bill to carry the recommendations of the joint committee into effect." An effort will be made to secure its early passage so that hearings before the joint committee may be promptly had and proposals for legislation drafted in accordance with the light there obtained. The resolution is general in its terms, it being the sense of the committee that there should be no effort to indicate specific subjects or to confine the joint committee's consideration thereto. The Lawyers' Committee is an outgrowth of the movement of some years ago to secure increases in the salary of federal judges. It is made up of representatives from all of

the states of the union, and there is a sub-organization in each state for the purpose of cooperating with it. Thomas B. Felder of New York is Chairman, Geo. H. Fearons of New York is Vice-Chairman, and William L. Ransom of New York is Secretary.

Washington's Administrative Reorganization

The Bill for the Administrative reorganization of the State of Washington, passed by the recent session of the Legislature and now in effect, provides for ten departments of the State Government, as follows: Public Works, Business Control, Efficiency, Taxation and Examination, Health, Conservation and Development, Labor and Industries, Agriculture, Licenses, Fisheries and Game.

A Director of each department is to be appointed by the Governor, with the consent of the Senate, and to hold office at the pleasure of the Governor. The Governor and Directors constitute the Administrative Board, of which the Governor is Chairman. This Board will have power from time to time to systematize, unify and correlate the work of the various departments; to classify all subordinate officers and employes in accordance with the system prepared by the Director of Efficiency; to determine their salaries and compensations, and, in case of emergency and under certain safeguards, to permit departments, officers or institutions to incur liabilities in excess of the amount appropriated by the legislature; and to perform certain other duties.

Maximum salaries for the various Directors authorized under the act range from five thousand to seventy-five hundred dollars.

Politics and the Judiciary

The Chicago Bar Association is grappling with an unprecedented situation in an effort to prevent the domination of the Circuit Bench of Cook County by a political faction. The situation is that twenty members of the Circuit Bench are to be elected at the coming judicial election, and that these judges will not only control the number of employes in important county offices, but will also have the power to appoint the members of the South Park Board, one of the great taxing bodies of the community. This board has already embarked on a vast construction program, for which twenty millions in bonds have been voted and for the completion of which approximately seventy million dollars will be required. Realizing that the power to appoint the board would naturally tend to make the judicial positions the coveted prize of politicians, intent on controlling the immense expenditures in prospect, a committee composed of ex-presidents of the Chicago Bar Association attempted to confer with the managers of all parties with a view to insuring a satisfactory ticket.

It could not induce the City Hall, or Thompson, faction of the Republican party to participate in any conference; but it learned that this group planned to exclude from its ticket fifteen or more of the twenty sitting judges. From which it affirmed it was forced to conclude that the faction desired to control the Circuit Bench for its own purposes. Other factions of the Republician party, however, were found willing to support a coalition ticket. The committee thereupon recommended to the Democratic County Convention that it place in the Democratic columns the names of all the sitting judges who would accept the nomination, whether Republicans or Democrats. "We were satisfied," the committee reported to the Board of Managers of the Association, "that all of the sitting judges who were likely to accept such nomination were satisfactory to a great majority of the Bar . . . and that the return of a great majority of the present sitting judges would, more surely than any other means, prevent the domination of the Circuit Bench by a political faction for any improper purpose." The efforts in this direction were effective and the coalition ticket was formed.

The Board of Managers thereupon directed that a referendum vote be taken on the two tickets, and the result was that ninety per cent of the members of the association, which is one of the largest in the country, declared in favor of the coalition ticket. The well known fact that a majority of the members of this association are Republicans in politics emphasizes the significance of the vote. The committee of ex-presidents of the association which has been active in dealing with the situation is as follows: Amos C. Miller, Chairman; Horace Kent Tenny, Frank J. Loesch, Thomas M. Hoyne, Edgar B. Tolman, John T. Richards, Silas H. Strawn, Mitchell D. Follansbee and Charles S. Cutting.

Quarters for Bar Association

The Bar Association of the City of New York has voted to erect a sixteen story office building as an addition to the Bar Association building at 42 West 44th Street. The new structure will be erected on the unimproved property owned by the Association east of its present building. Two floors will be occupied by the Association for conference rooms and for an extension of its Law Library, said to be one of the largest in the world. It is planned to rent as many of the offices as possible to lawyers and thus create an up-town law center.

To Revise Kansas General Statutes

The Kansas Legislature recently provided for a commission, to be appointed by the Supreme Court, for the revision and compilation of the General Statutes, there having been no revision in that state since 1868. The following were appointed members: Chester I. Long, Wichita; F. Dumont Smith, Hutchinson; Hugh P. Farrelly, Chanute. The Commission elected Chester I. Long as its chairman. It will present its report at the next session of the Legislature, in 1923.

SIGNED ARTICLES

As one object of the JOURNAL issued by the American Bar Association is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

THE JUDICIAL SYSTEM OF RUSSIA

Soviet Government's Establishment of Arbitrary and Irresponsible Tribunals Which Are to Be Guided by the "Socialist Conscience" in the Absence of Express Proletarian Decrees

By Harry M. Fisher*

IF THERE are any who see virtue in the economic or political experiments of Russia, certain it is that for its judicial system none can offer defense. The Communists themselves attempt no defense; they merely justify on alleged grounds of necessity. It is not a system at all. It is something that has grown up since the Revolution, subject to no restraint, to no particular laws, and is a power exercised by men wholly untrained, many of them illiterate and responsible only to what they call their "Revolutionary conscience."

The only provision I could find in the Russian Constitution with reference to the judiciary is that there shall be established a Department of Justice, without any definition of its powers; but in the portion which enumerates the powers of the All-Russian Executive Committee and the All-Russian Conference, the following provision is found:

> It shall have power to provide for the general government, law enactment, the establishment of courts and procedure, civil and criminal, law-making, etc.

But in the Constitution of Russia is not to be found the real programme of Russia, no more than the real Government is to be found in the official governmental departments. The governing power of Russia is the Executive Committee of the Communist Party, to which all of the officials must submit their contemplated action for approval or disapproval, and to which all legislative enactments are presented before they may be enforced. It is in the programme of that party that something can be found about the judiciary.

I quote from a pamphlet bearing the title "Programme of the Russian Communist Party (Bolsheviks)" adopted at the 8th Conference, March 23, 1919. The style adopted in all the Russian official writings should be observed. Whether you read the Constitution, official decrees or the programme of the government, you will always find that it is so written as to constitute in itself matter for propaganda.

> JURISPRUDENCE.—Proletarian democracy, taking power into its own hands and finally abolishing the organs of domination of the bourgeoisie—the former courts of justice—has replaced the formula of bourgeois democracy, judges elected by the people, by the class watchword: the judges must be elected from the working masses and only by the working class.
>
> In order to induce the broad masses of the proletariat and the peasantry to take part in the administration of justice, a bench of jury-judges sitting in rotation under the guidance of a permanent judge is introduced and various labor organizations and trade unions must impanel their delegates.
>
> The soviet government has replaced the former endless series of courts of justice with their various grades by a very simplified, uniform system of people's courts accessible to the population, and devoid of useless delay.
>
> The soviet government, abolishing all the laws of the overthrown governments, commissioned the judges elected by the soviets to carry out the will of the proletariat in compliance with its decrees and, in cases of absence or incompleteness of decrees, to be guided by socialist conscience.
>
> Constructed on such a basis, the courts of justice have already led to a fundamental alteration of the character of punishment, introducing conditional verdicts on a wide scale, applying public censure as a form of punishment, replacing imprisonment by obligatory labour with the retention of freedom, reformation in tribunals institutions, and applying the principle of Comrade Tribunals (tribunals selected from an accused person's fellow workers).
>
> The Russian Communist party in order to assist the further development of the courts of justice on these lines will try its utmost to induce all workmen without exception to perform judicial duties and finally strive to substitute the system of punishment by educational measures.

This is all that I find in the programme with reference to the courts.

This simplified and uniform system provided for has been neither simple, uniform nor systematic. It is nothing short of a tyrannical exercise of absolute power guided by the whims of each tribunal.

The so-called Narodnich-Sude, or People's Courts, are exercising now very little power, trying only cases assigned to it by the Cheresvechaika. In the early days their power was unrestricted. They have records of death penalties executed by those courts. Its judiciary is composed entirely of workingmen selected by the trades unions.

These judges do not sit for any length of time, the policy being to rotate, so that as many workingmen and peasants as possible can be trained in the administration of justice. The City of Petrograd prides itself on having had already forty thousand judges. In July, when I was there, the entire working population of Petrograd was not more than forty thousand.

In addition to these People's Courts, there have grown up two other tribunals; the Revolutionary Tribunal, which originally was created for the purpose of suppressing counter-revolutions, but later, like the People's Courts, became a court which tries only cases referred to it by the other court, the Cheresvechaika, the all-important tribunal in Russia.

Before the Revolutionary Tribunal hearings are supposed to be had in the open, but lawyers of the "Old Bourgeois" government are not permitted to appear. The trades unions may designate workingmen to appear as lawyers before this court.

The third tribunal, the all-powerful institution, is called the Cheresvechaika, The Extraordinary Commission. Its real designation is the "All-Russian Extraordinary Commission, for the suppression of counter-revolution, speculation and sabotage." It was created when the Government decided upon its policy, to carry out the so-called reign of terror, and was practically given absolute power over the lives of all the Russians.

It is not in reality a court, as we understand one. It is a sort of gendarmerie. The agents of the

*Judge Municipal Court of Chicago; Chairman Russian and Ukrainian Committee of Joint Distribution Committee of American Fund for Jewish War Sufferers.

Cheresvechaika arrest, prosecute, adjudge and execute. The same man may be the arresting officer, the prosecutor, the judge who renders the decree and who with his own hand executes the offender.

This court has a federal body, the All-Russian Cheresvechaika, as well as branches in every state, province, city and village.

In the villages particularly the judges are selected from among the poor peasants, most of whom are illiterate. These men, mind you, have absolute power, without responsibility to anybody, to carry out any decree they may enter.

In the days following the uprising which was signalized by the killing of Mirbach, the German Ambassador, and again, after the attempted assassination of Lenin, on September 1, 1918, these courts, throughout the country, without exception, took into custody not only every suspected man, but every stranger who happened to be in the town or village, and in all likelihood, every enemy that any particular judge or body of the judges might have had within the district, all of whom, with but few exceptions, were executed on the day after the arrest.

The official record of the All-Russian Cheresvechaika is that eight thousand five hundred men were executed.

Most of the work, however, was done by the Municipal Extraordinary Commissions, and of that no record seems to exist.

In the Spring of 1920 the abolition of capital punishment was decreed, but the Cheresvechaika continued to execute men. And this is the way they did it, without violating the socialistic conscience. Certain portions of Russia were declared to be under military rule, and it was held that within that region capital punishment should prevail. So, if someone in Moscow offended, he was promptly transported to a point within the military zone, and was there tried and executed.

While in Moscow I had the privilege of being invited to the All-Russian Cheresvechaika, in itself considered a distinction, because ordinarily the men and women who, while walking Moscow's streets, are required to pass this famous court-house go about a square around so as to avoid getting anywhere near the building.

When I came to Russia I discovered that one hundred and seven of the leading Jews of Russia were incarcerated in the custody of the Cheresvechaika, charged with being Zionists. Zionism is the national programme of the Jews, and some seventy per cent of the Jews of Russia and the Ukraine are Zionists; and Zionism has been declared a counter-revolutionary movement. Some of these men would in all probability have been executed but for the intervention of M. Chitcherin. In that connection I had the good fortune to become acquainted with the young man in charge of the prosecution. After a long night's discussion, he said to me, "I am willing to submit the evidence to you. If you say that these men are innocent, we will let them go." I readily accepted the invitation, and as a result spent five days in this famous court-house reading the evidence.

During that time I became acquainted with some of the leading spirits of that court, particularly Latsis, of whom so much has been heard, and who is credited with having executed more men than any other living being.

After considerable talk over the system of the Cheresvechaika, I asked this question:

> Why do you not at least permit the defendants to face their judges? Why do you not tell them what offense they are charged with and give them a chance to explain? Even if you are going to execute them after that, at least there ought to be the appearance of having given them a chance to face their accusers.

The answer was:

> You must remember that we are at war, at war against a class. When you catch a spy in your ranks, you do not stop to give him a trial. You execute him. Every member of the Old Bourgeoisie is our enemy. We are not at war with a Nation, but at war with a class. Whoever belongs to that class is, by virtue of that alone, our enemy. Now, what is the use of bringing a Bourgeois before the Court, and let him explain that he is not a counter-revolutionist? Suppose he says that he is not. That would merely be because he wants to save his hide. We cannot believe him if he does say it. So why listen to him?

The fact is that many of these men were executed even without knowing that they were convicted.

Right now this tribunal is taking more and more power into its own hands. It is the powerful arm of the Militarists of Russia.

Today you cannot leave Moscow or Petrograd; you cannot get into one of those cities or remain in a house for longer than twenty-four hours without reporting to this particular tribunal and getting its approval. It has no regard for the action of any of the other departments of state. It is responsible to no one.

The Communist officials themselves seem to fear it. There is provision for appeal from the local or gubernatorial Cheresvechaika to the All-Russian, but ordinarily the defendant is executed before the appeal is perfected. They do their work rapidly.

None of those courts have any law to guide them. It is openly talked about that many of them have used their power to avenge themselves on old-time enemies. A very natural thing under such conditions.

Similar tribunals are established in connection with the army, and they operate in pretty much the same way.

There is still one more tribunal that exists in Russia.

All trade, as is known, has been abolished with the abolition of private property, and men are expected to subsist on the rations that the Government furnishes, which, in the cities, consists of about three quarters of a pound of black bread a day for the ordinary workingman, and a pound and a half of that same bread for those doing hard manual labor. That is all they get. The stores are closed, and trade of every kind is prohibited. As a result of that all connection between the cities and the farms has been severed. The middle-man is gone and the government has taken his place only to the extent of getting the bread it gives out, upon which alone the population cannot live. But the people will live. They cannot get along on this bread, so, while trading is prohibited, everybody is trading. Even workingmen leave the factory on Thursday night; go out to the farms and gather up such products as they can; come back to the cities and sell it, and do not return to the factory before Tues-

day morning. If you do not trade in some form or other you cannot live. There has grown up in Russia a merchant class which is accumulating enormous quantities of currency in circulation there. They are called speculators, and nicknamed "Sovbour," an abbreviation of Soviet Bourgeoisie. The market where this illegal trade is conducted is run in the open in the City of Moscow and covers an area from ten to twelve blocks, and from fifteen to twenty thousand purchasers come there daily. Occasionally the place is raided, but there, as here, the raid is tipped off in advance, and it does not accomplish very much.

Illegal operations carried on on such a huge scale are impossible without the connivance of the officials, with the result that the great body of Russia's officialdom, with the exception of the leading men, most of whom seem honest, has become corrupted to such an extent that bribery is a recognized institution. The tradesmen and officials maintain clandestine courts, where, I was told, most of the litigation is concerning actions by officials to recover bribes promised but not paid for the performance of some official act.

When I asked one of Moscow's former lawyers how he could permit himself to stand before any tribunal pleading the cause of a bribe taker suing to recover a bribe, his answer was:

> Morality is a relative thing; and when a thing ordinarily considered immoral becomes a thing upon which life itself depends, it is no longer to be regarded as offensive, but as a virtuous thing, to be sustained. And bribery of Russian officialdom is the only thing now that makes possible for the City's population to live at all.

Lawyers manage to live by practicing in these clandestine courts, and also by engaging in a new sort of real estate business which has grown up.

With the abolition of private property, the Government has taken over all the real estate. But, as trading goes on in other commodities, so also trading goes on in real estate. Men buy and sell property which the Government is supposed to own, and lawyers are busily engaged in watching the chain of title, in the hope that when some new government will succeed the present one, the original title will be recognized and confirmed in the holder if he can prove proper conveyance.

The speculation in real estate there is enormous. The speculators make millions and millions of rubles. To make ten million rubles on the sale of a piece of property is not at all an extraordinary thing. But, of course, it must be kept in mind that in July I obtained three thousand rubles for a dollar, and today I hear that the ruble has dropped to ten thousand for the dollar. The Government expects eventually to abolish money altogether; and so it is continually printing its script without keeping account of it. The officials say they do not worry about this accumulation of new wealth; eventually they say it will all be worthless. I think they will succeed in carrying out this part of their programme.

All this may seem to us in America as humorous, but to the Russian people it means much. A few men, a small group of men, have gained control over the destinies of a hundred and fifty million souls; and because of their experiments the innocent men, women and children of Russia are being starved to death.

In the City of Moscow and in the city of Petrograd no fuel could be obtained to heat the houses during the bitter winters. They resorted to the breaking down of wooden houses, and used the lumber for fuel; and even with the illegal trading to which I referred they can get barely enough—those that are fortunate enough to have much money—can get barely enough to subsist on.

Every Fall, just as surely as the season comes, so comes a recurrence of that dread disease typhus, which wipes out thousands and tens of thousands. Relief does not seem in sight.

Many who condemn Russia make no distinction between the ruling class and the large body of the innocent sufferers, who are entitled to our sympathy and aid; whose only occupation and thought is devoted to the effort of obtaining bread for their starving families.

I hope that the day is not far off when America will be able to do for the children of Russia at least what it is doing for the children of Eastern and Central Europe.

"GOVERNMENT UNDER LAW"

The following article, admirable for matter and spirit and on a subject which engages the attention of good citizens in all sections, is reproduced from the Arkansas Methodist of Thursday, April 14, 1921. This periodical is the official organ of the Little Rock and North Arkansas Conferences, M. E. Church, South, and is printed at Little Rock, Ark.:

"DURING the past week the State of Arkansas was virtually on trial before the whole nation. About a month before, the crime which, more than any other, stirs the moral indignation of every honorable white man to instantaneous and unrelenting fury, had been committed in our capital city against a virtuous, defenseless, and truthful white woman under circumstances which seemed to the public to make unmistakable identification of the assailant possible. Out of a large group this woman had indicated a negro as the assailant. The city and county authorities had by careful precautions thwarted the efforts of a mob and removed the prisoner to a safe place. The grand jury had indicted him, and the day of trial had been fixed. The circuit judge had determined to have a fair trial and to protect the prisoner.

"Three competent and reputable lawyers, a former prosecuting attorney, a former police judge, and a member of a fine law firm, were, over their own objection and against the vehement protest of some good people, appointed to defend. As special jurors high class men, including a former chief justice and a former associate justice, big business men, and pastors of leading churches, were summoned. Those selected were a former governor, two wholesalers, two lumbermen, a contractor, a real estate dealer, an automobile manufacturer, a Catholic prelate, a Presbyterian pastor, a Methodist presiding elder, and the editor of this paper. The four preachers and two of the laymen could have been exempt on proper legal grounds, but, feeling that they had been specially drafted for diffi-

cult service, they, much against their personal inclination, but yielding to the call of duty, declined to claim their exemption. The courtroom was packed with spectators, about two-thirds whites and one-third negroes, all of whom had been examined for concealed weapons, and the prisoner and all others were guarded by a large body of deputy sheriffs, policemen and soldiers in uniform. All other business was postponed six days to give ample time, and, after the formal preliminaries, the mere spectators were dismissed until a later hour, and the assaulted woman, modest and shrinking, was delicately and yet skillfully questioned and cross-questioned.

"Then some twenty-five witnesses were searchingly examined, the six able lawyers skillfully analyzed the evidence and presented their theories, and with the judge's painstaking instructions the jurors retired and deliberated from Friday night until Monday morning. It was necessary to weigh the value of the evidence for positive identification of the assailant and the value of the testimony of a large number of witnesses to prove an alibi. The jurors believed that, with fuller opportunity to investigate, additional facts could be developed. Some of them had intended to ask additional questions, but had waited until too late under the rules. Their first vote, taken by ballot before discussion among themselves, was intended to reveal the attitude of each at that time with the distinct understanding that as the study progressed opinions might change. It was practically agreed that all minds would be kept open until it should become necessary to cast the final vote. Seven voted guilty, five not guilty, but at one point four of the minority agreed that they could vote for the verdict of guilty with imprisonment for life if the judge's interpretation of the implications of that kind of vote would enable them conscientiously to resolve their reasonable doubts. The jury appeared before the court and different members stated their positions, and then after hearing the judge's fuller instructions retired, and the abovementioned four finding that they could not conscientiously under the instructions adhere to their later tentative position, voted as they had at the beginning, and, all agreeing that further attempt to get together was useless, the judge dismissed the jury.

"In the conduct of this trial it was demonstrated beyond cavil that the attorneys did neither more nor less than was their solemn duty and that every juror endeavored to secure all possible light before reaching his final vote. There was no quibbling, no mere casuistry, no resort to technicalities, but twelve honest, God-fearing citizens, loyal to the call of duty, under circumstances of unusual difficulty, were seeking to find a verdict that would enable them to stand with a clear conscience before their fellows and before God. They were men whose sympathies and attitude on racial and political questions are Southern and who knew the state of mind of both races and the desirability of pursuing the wisest course. They were not willing, on the one hand, to appease the demand for a victim, nor, on the other, to be merely technical in their attitude toward the different elements of the evidence. Under the well wrought out rules for judging the value of evidence there was a reasonable doubt concerning the conclusiveness of various facts when taken in their right relation to other facts, and the doubts had to be resolved by weighing and comparing these different factors of the whole case. Every juror believed that the real criminal ought to die for this crime, but it would not satisfy the demand of righteousness to punish an innocent man nor to acquit one who was guilty; consequently these jurors, with perfect honesty and desire for the triumph of right, voted as they felt they must vote under the law and with the facts before them.

"No jury of similar composition had ever met in the history of the State. No twelve men could deliberate under like circumstances for almost four days and have a greater harmony of sentiment and part with higher regard for one another. The experience was so painful that strong men, laymen as well as preachers, wept, and each man desires that he may never again be required to undergo such an experience, but no man regrets his connection with the case.

"The achievement is that Arkansas by the proper use of her courts can give an absolutely fair and impartial trial to one of her humblest citizens. It is folly for anyone to argue that because this case resulted in a hung jury it is useless to invoke the law in such cases. If the case demonstrates anything it is that a mob is not competent to judge, and that no man's life is secure unless the deliberate and sensible processes of the courts are invoked. If a man's life can be taken merely because some one, however honest and pure-minded, says without using the safeguards necessary to prevent error, that another is the criminal, then no man's life is safe. If ever in our history we needed to use our courts and to trust them, it is today.

"Not only are the lawyers and judge and peace officers to be highly commended in this case, but our city newspapers for the fairness of their reports and their restraint of the sensational elements and appeals to prejudice, and for the wise and patriotic editorials. What could exhibit a finer spirit than the following editorial which appeared in the Arkansas Gazette the morning after the jury was dismissed?

> "The negro, Emanuel West, who was charged with committing a crime that filled the people of this city with righteous resentment, was tried before a jury, the like of which is seldom empaneled. It consisted of the Rev. James Thomas, the Rev. A. C. Millar, Monsignor T. V. Tobin, the Rev. Hay Watson Smith, Caughey Hayes, E. C. Nowlin, C. F. Bizzell, former Governor George W. Donaghey, A. C. Read, B. P. Kidd, A. T. Toors and Martin Sharp.
>
> "It is public knowledge that at the end of its long deliberations the jury stood seven to five for conviction. No man should let his natural desire that punishment be meted out in the electric chair, for the heinous crime charged against this negro, betray him into condemnation of those jurors who were not convinced of the defendant's guilt and, therefore, could not vote to take his life. They heard every word of the evidence and gave it the most careful consideration. When five members of this jury, which was composed of men of character and intelligence, could not convince themselves that this defendant was guilty, the public must control its feelings over the failure of the law thus far to avenge a crime that calls for avenging.
>
> "This deplorable case has put the community on trial. A splendid civic spirit was exhibited when 12 of Little Rock's best citizens took their places in the jury box and when W. R. Donham, M. E. Dunaway and Fred A. Isgrig, under appointment of Judge Wade, undertook the thankless task of conducting the defense, a duty to which they gave days of their time. This community will further vindicate itself as a community of law and order by awaiting the orderly procedure of the courts in the case of this accused negro and by accepting as the finding of justice whatever result shall finally be reached."

REVIEW OF RECENT SUPREME COURT DECISIONS

Limitation of Liability by Carriers—Interesting Example of "Concurring Dissent" on Lever Act—Search and Seizure—Counterfeiting—Attempt to Corrupt Juror—Freedom of the Press—Municipal Franchise Question—Exemption of Farm Loan Bonds—Estate Tax Question — Occupation or Property Tax?—Important Income Tax Decisions

By Edgar Bronson Tolman

Carriers.—Limitation of Liability, Agreed Valuation

Union Pacific Railroad Co. v. *Burke,* Adv. Ops. p. 318.

This was a suit to recover the fair invoice value of 56 cases of goods shipped from Yokohama, Japan, which while in the custody of the Union Pacific Railroad Co. were totally destroyed in a collision. The railroad company conceded the right of recovery but only for the amount of $100 per package, which it was contended was thus limited by the Yokohama bill of lading. The full value of the invoice was $17,-449.01. The appellate division of the New York Supreme Court gave judgment for $5,600 with interest and costs, but on appeal to the Court of Appeals the judgment was reversed with directions to enter judgment for the full value. On the back of the bill of lading were thirty-one conditions, the thirteenth of which read:

> It is expressly agreed that the goods named in this bill of lading are hereby valued at not exceeding $100 per package . . . and the liability of the companies therefor in case of the total loss of all or any of the said goods from any cause shall not exceed $100 per package.

The railroad company had filed with the Interstate Commerce Commission its schedule of rates and regulations and in these schedules was one which provided that the property transported by it was subject to the provisions of the "uniform bill of lading." This bill of lading contained among other conditions the following:

> The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property . . . unless a lower value has been represented in writing by the shipper, or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence.

Mr. Justice Clark delivered the opinion of the court and said:

> In many cases . . . it has been declared to be the settled Federal law that if a common carrier gives to a shipper the choice of two rates, the lower of them conditioned upon his agreeing to a stipulated valuation of his property in case of loss, even by the carrier's negligence, if the shipper makes such a choice, understandingly and freely, and names his valuation, he cannot thereafter recover more than the value which he thus places upon his property. . . .
>
> This court has consistently held the law to be that it is against public policy to permit a common carrier to limit its common-law liability by contracting for exemption from the consequences of its own negligence or that of its servants . . . and valuation agreements have been sustained only on principles of estoppel, and in carefully restricted cases where choice of rates was given—where "the rate was tied to the release." . . .
>
> Having but one applicable published rate east of San Francisco the petitioner did not give, and could not lawfully have given, the shipper a choice of rates, and therefore the stipulation of value in the Yokohama bill of lading, even if treated as imported into the uniform bill of lading, cannot bring the case within the valuation exception, and the carrier's liability must be determined by the rules of the common law. To allow the contention of the petitioner would permit carriers to contract for partial exemption from the results of their own negligence without giving to shippers any compensating privilege. Obviously such agreements could be made only with the ignorant, the unwary, or with persons deliberately deceived.

Argued by Mr. Oscar R. Huston for the plaintiff and by Mr. Arthur W. Clement for the railroad company.

Criminal Law.—(a) Standard of Guilt, Lever Act

United States v. *Cohen Grocery Co.,* Adv. Ops. p. 300.

The defendant was indicted for profiteering in sugar and demurred to the indictment on the ground that the indictment and the statute itself were so indefinite as not to point out what acts were forbidden. The District Court for the Eastern District of Missouri sustained the demurrer, holding that the law fixed no immutable standard of guilt but left such standard to be fixed by the different courts and juries which might be called upon to enforce it; that it was therefore so vague, indefinite and uncertain as not to inform the defendant of the nature and cause of the accusation against him, and that since Congress alone had power to define crimes against the United States and could not delegate it to courts or juries, the act was unconstitutional and the indictment demurrable.

The opinion was delivered by the Chief Justice who first took up the question of the interpretation of the statute. The relevant parts of the section were set out as follows:

> That it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries; to conspire, combine, agree, or arrange with any other person . . . to exact excessive prices for any necessaries. . . .

and in regard to the construction hereof it was said:

> The basis upon which the contention rests is that the words of the section do not embrace the price at which a commodity is sold, and, at any rate, the receipt of such price is not thereby intended to be penalized. We are of opinion, however, that . . . the words of the section, as re-enacted, are broad enough to embrace the price for which a commodity is sold.

In support of the act in question it had been urged below and on the argument in the Supreme Court that the existence of a state of war operated to strengthen the act. This contention was disposed of in the following language:

> We are of opinion that the court below was clearly right in ruling that the decisions of this court indisputably establish that the mere existence of a state of war could not suspend or change the operation upon the power of

> Congress of the guaranties and limitations of the Fifth and Sixth Amendments as to questions such as we are here passing upon. . . . It follows that, in testing the operation of the Constitution upon the subject here involved, the question of the existence or non-existence of a state of war becomes neglible, and we put it out of view.

The opinion then proceeded to discuss as the "sole remaining inquiry" the question whether the words, "that it is hereby made unlawful for any person wilfully . . . to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," fixed an ascertainable standard of guilt adequate to inform the accused of the nature and cause of the accusation, and in answering this question in the negative the learned Chief Justice inserted in the margin comments from the opinions of judges in seven different jurisdictions showing with what variance the trial courts had interpreted the act, and how differently they had regarded what was and what was not an offense against it. Approving the language of the District Judge for the Eastern District of Missouri, the Chief Justice said:

> In fact, we see no reason to doubt the soundness of the observation of the court below in its opinion to the effect that, to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury.

The statute was therefore held to be repugnant to the constitution and the judgment of the District Court, quashing the indictment on that ground, was affirmed.

It is of interest to note that there was no dissent filed in this case from the judgment of the court, but notwithstanding the unanimity of opinion as to the judgment, sharp conflict of opinion appeared as to the reasoning upon which the prevailing opinion was founded.

Mr. Justice Pitney filed a concurring opinion in which Mr. Justice Brandeis concurred, in which he said:

> I concur in the judgment of the court but not in the reasoning upon which it rested. . . . I am convinced that the exacting of excessive prices upon the sale of merchandise is not within the meaning of that provision of the act which is cited as denouncing it; that the act does not make it a criminal offense . . . and that whether the provision is in conflict with the Fifth or Sixth Amendment is a question not necessarily raised, and which ought not to be passed upon.

The learned Justice sets out the pertinent provisions of the statute at length and says:

> The court holds that the words "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" are broad enough to embrace the exaction of an excessive price upon a sale of such merchandise. Why Congress should employ so unskillful and ambiguous a phrase for the purpose when it would have been easy to express the supposed purpose in briefer and more lucid words, it is difficult to understand.

He also invokes the argument that the act is a penal statute which should not be so construed as to bring it into conflict with the constitution, unless such construction is imperatively required by its plain words, and asserted that the words "to make a rate or charge in handling or dealing in or with" merchandise imported the fixing of compensation for services rather than for price, that it might refer to charges for buying, selling, hauling, handling, storage or the like.

From the context the learned Justice further argues that the clause formed part of a section in which the question of price was repeatedly dealt with in terms, and that therefore the words "to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries" must be taken to mean something else than the exaction of an excessive price, that subject having been clearly and plainly referred to in the other clauses of the same section.

This case furnishes a most interesting example of what may be called the "concurring dissent." Mr. Justice Pitney certainly presented a powerful argument on the proposition that, viewed in the light of established doctrines of statutory construction, the act did not embrace profiteering in necessaries unless such profiteering was part of a *conspiracy* to that end and yet the very basis of their dissent from the reasoning of the court led to a concurrence in its judgment.

Nine other cases were decided with the Cohen case. The judgment of the District Court of Colorado enjoining prosecution under the Lever act was sustained; the judgments of the District Court for the Southern District of Mississippi, the Western District of New York and the Northern District of Ohio, dismissing bills to enjoin such prosecutions were reversed; the judgment of the District Court for the Eastern District of Michigan, quashing indictments under the act, was affirmed; the decisions of the District Courts for the Northern District of Georgia and for the Northern District of New York, sustaining indictments and convictions under the act, were reversed.

The cases were argued orally by Solicitor General Frierson for the Government and by Messrs. Lewis P. Sher, Chester H. Krum, Charles E. Hughes, Clayton C. Dorsey, Garner Wynn Green, Simon Fleischmann and Edgar Watkins for the various defendants.

(b) Self-Incrimination, Search and Seizure.

Gouled v. *United States,* Adv. Ops. p. 311.

Gouled and others were indicted as parties to a conspiracy to defraud the United States. Gouled was convicted and appealed. On the trial documents were offered in evidence which had been taken from the defendant's office, and it was claimed that the admission of these papers was error because possession of them was obtained by violating the rights of the defendants secured by the Fourth and Fifth Amendments to the Constitution. The documents were taken as follows:

A member of the Intelligence Department of the Army who was a business acquaintance of Gouled, pretending to make a friendly call, gained admission to defendant's office and in his absence, without warrant of any character, seized and carried away several documents of evidential value only, belonging to the defendant, one of which was subsequently delivered to the U. S. District Attorney and by him introduced in evidence over the objection of the defendant, the objection being made as soon as the paper was offered in evidence which was the first intimation the defendant had that it had been taken. The court held that the objection was not too late and that the provision of the rule of practice that such an objection would not be entertained unless it was made before trial was inapplicable in such a case. The opinion was delivered by Mr. Justice Clarke and on this point he said:

> The prohibition of the Fourth Amendment is against all unreasonable searches and seizures; and if for a government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers, would be an unreasonable, and therefore a prohibited, search and seizure, as it certainly would be, it is impossible to successfully contend that a like

search and seizure would be a reasonable one if admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded, and the search and seizure would be as much against his will in the one case as in the other; and it must therefore be regarded as equally in violation of his constitutional rights.

Other papers had been taken by search warrant, and before trial a motion was made for their return. This motion was denied and when renewed at the trial before any evidence was introduced, it was again denied. The very documents seized were not offered in evidence but a duplicate original of one of them, obtained from another source, was admitted over objection that the possession of the seized original must have suggested the existence of the counterpart and that, therefore, its use in evidence would violate the rights of the defendant under the Fourth and Fifth Amendments. On this point the court said:

> Although search warrants have thus been used in many cases ever since the adoption of the Constitution, and although their use has been extended from time to time to meet new cases within the old rules, nevertheless it is clear that, at common law . . . they may not be used as a means of gaining access to a man's house or office and papers, solely for the purpose of making search to secure evidence to be used against him in a criminal or penal proceeding, but that they may be resorted to only when a primary right to such search and seizure may be found in the interest which the public or the complainant may have in the property to be seized, or in the right to the possession of it, or when a valid exercise of the police power renders possession of the property by the accused unlawful, and provides that it may be taken.

The Circuit Court of Appeals propounded to the Supreme Court six questions as to whether or not the taking of the document in question under the circumstances above set forth constituted an infringement of the defendant's rights and, for the reasons stated in the opinion of the court, all of the questions were answered in the affirmative.

The case was argued orally by Mr. Charles E. Hughes for the defendant and by Solicitor General Frierson for the United States.

(c) Counterfeiting, Construction of Act.

Baender v. *Barnett*, Adv. Ops. p. 342.

Appellant was indicted under Sec. 169 of the Criminal Code which declares that "Whoever, without lawful authority, shall have in his possession" any die in the likeness or similitude of a die designated for making genuine coin of the United States, shall be punished," etc. The indictment charged that he wilfully, knowingly, and without lawful authority, had in his possession certain dies of that description. He entered a plea of guilty and was fined and sentenced to imprisonment. He made an explanatory statement that the dies were in some junk he had purchased and that he did not know of their presence nor of their coming into his possession. But this statement seems to have been made for the purpose only of inviting a lenient sentence. After sentence he filed a petition for a writ of habeas corpus, which was denied, and he appealed to the Supreme Court. One of the petitioner's contentions was that the statute is repugnant to the due process of law clause, because it condemns a possession which is neither willing nor conscious. The District Court held that the statute rightly construed means a "willing and conscious possession" and the court added:

> Such is the possession intended by the indictment, and such is the possession, the petitioner having pleaded guilty to the indictment, that he must be held to have had. Otherwise he was not guilty. He might have pleaded not guilty, and upon trial, shown that he did not know the dies were in his possession.

Mr. Justice Van Devanter delivered the opinion of the court and, in sustaining the position of the District Court, said:

> We think the court was right. The statute is not intended to include and make criminal a possession which is not conscious and willing. While its words are general, they are to be taken in a reasonable sense, and not in one which works manifest injustice or infringes constitutional safeguards.

In support of this principle he cited from U. S. v. Kirby:

> All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression, or an absurd consequence. . . . The common sense of man approves the judgment mentioned by Puffendorf, that the Bolognian law which enacted "that whoever drew blood in the streets should be punished with the utmost severity" did not extend to the surgeon who opened the vein of a person that fell down in the street in a fit. The same common sense accepts the ruling, cited by Plowden, that the Statute of 1st Edward II, which enacts that a prisoner who breaks prison shall be guilty of felony, does not extend to a prisoner who breaks out when the prison is on fire—"for he is not to be hanged because he would not stay to be burnt."

The other contention of the petitioner was that the clause of the Constitution enabling Congress "to provide for the punishment of counterfeiting of the coin of the United States" is a limitation as well as a granting of power; that the act which the statute denounces is not counterfeiting and that therefore Congress cannot provide for its punishment. The court rejects this contention, declaring that it rests on a misconception not only of the clause cited but also of the clause investing Congress with the power "to coin money" and to "regulate the value thereof," both of which have been held by repeated decisions to authorize Congress not only to coin money in a literal sense but also to adopt appropriate measures to safeguard the public against spurious and debased coin, and that the power of Congress in that regard is in nowise limited to the clause relating to the punishment of counterfeiting. In the application of this doctrine to the facts of the case, he said:

> It hardly needs statement that, in the exertion of this power, the conscious and willing possession, without lawful authority, of a die in the likeness or similitude of one used or designated for making genuine coin of the United States, may be made a criminal offense. If this be not a necessary, it is at least an appropriate, step in effectively suppressing and preventing the making and use of illegitimate coin.

The judgment of the District Court was therefore affirmed. The case was argued for the petitioner by Mr. Levi Cooke and for the Government by Assistant Attorney General Stewart.

(d) Attempt to Corrupt Juror.

United States v. *Russell*, Adv. Ops. p. 381.

The defendant was indicted on a charge of endeavoring to corrupt a juror. The District Court of the United States for the Northern District of Illinois sustained a demurrer to the indictment and the government brought the record to the Supreme Court by writ of error. Mr. Justice McKenna delivered the unanimous opinion of the court.

The indictment alleged a violation of Sec. 105 of the Criminal Code of the United States, the material parts of which are as follows:

> Whoever corruptly . . . shall endeavor to influence, intimidate or impede . . . any grand or

> petit juror . . . in the discharge of his duty . . . shall be fined . . . or imprisoned . . . or both.

The indictment charged the defendant with unlawfully and corruptly endeavoring to influence a juror in the discharge of his, the juror's, duty in the trial of the celebrated Haywood case. It was set out in the indictment that the defendant, endeavoring to ascertain in advance of the examination whether a certain juror was favorably inclined toward Haywood and his co-defendants and corruptly to induce said juror to favor the acquittal of said defendants in case he should be selected as a juror at said trial, called at his home and engaged in conversation with his wife, in which he told her that he represented Haywood and his co-defendants, and asked her to question her husband as to his attitude toward them as to the charges in the indictment and to report the result to him, the defendant, because, as he then stated to the juror's wife, "they did not want to pay money to any of the petit jurors sitting at the trial of said case unless they knew that such petit jurors would favor their acquittal," thereby intimating to the juror's wife an offer to pay money in return for a verdict of acquittal. The alleged deficiencies of the indictment, as pointed out by defendant's counsel, were in substance as follows: That it did not appear that the said juror possesed the qualifications to act as such or had been duly and regularly drawn and summoned or examined and accepted as a juror, or at what time the juror's wife received the impression of the meaning of the conversation, or that she had access to her husband or had opportunity or could have communicated the conversation to him or that he was a juror in any particular case. The District Court sustained the demurrer and dismissed the indictment.

Mr. Justice McKenna delivered the opinion of the court. He said:

> Necessarily, the first impression of the case is that defendant had some purpose in his approach to Lucy Russell and in the proposition he made to her. What was it, and how far did he execute it? Counsel admits that defendant's purpose was to "find out what his (W. D. Russell's) attitude was toward the defendants to be tried." And that this (we are stating the effect of the counsel's contention) was only in preparation of a sinister purpose; that the defendants in the case did not wish to undertake, or, to use the language of the indictment, did not "want to pay money to any of the petit jurors sitting at the trial of said case unless they knew such petit jurors would favor their acquittal." And this, counsel says, "only amounted to a solicitation of a third person who did not accept or act in furtherance of such solicitation," and "could be interpreted only to be *preparation* for an 'endeavor' or 'attempt' to influence the juror, but falls far short of an actual endeavor to do so." . . .
>
> We think, however, that neither the contention nor the cases are pertinent to the section under review and upon which the indictment was based. . . .
>
> Criminality does not get rid of its evil quality by the precautions it takes against consequences, personal or pecuniary. It is a somewhat novel excuse to urge that Russell's action was not criminal because he was cautious enough to consider its cost and be sure of its success. The section, however, is not directed at success in corrupting a juror, but at the "endeavor" to do so. Experimental approaches to the corruption of a juror are the "endeavor" of the section. Guilt is incurred by trial—success may aggravate, it is not a condition of it.
>
> The indictment charges that defendant knew that William D. Russell was a petit juror, in the discharge of his duty as such juror, and, therefore, an endeavor to corruptly influence him was within the section, though he was not yet selected or sworn.

The judgment was reversed and the case remanded. The case was argued by Assistant Attorney General Stewart for the U. S. and by Mr. Otto Christensen for plaintiff in error.

Constitutional Law. — (a) Freedom of Press, Second Class Mail Privileges

United States ex rel. Milwaukee Social Democratic Publishing Co. v. *Burleson*, Adv. Ops. p. 390.

The publishing company filed a petition for mandamus in the Supreme Court of the District of Columbia, commanding the Postmaster General to annul an order entered by him in September 1917, after a hearing, revoking the second class mail privileges to the Milwaukee Leader. The Postmaster General set up in his answer more than fifty excerpts from editorial articles which appeared in the relator's newspaper between April and September 1917, declaring that the war was unjustifiable and dishonorable, a capitalistic war forced on the people by a class to serve its selfish ends. Our government was denounced as a unconstitutional, arbitrary and oppressive. Our allies were "repeatedly condemned and our enemies frequently praised." The Postmaster General justified his order revoking the second-class mail privileges of the relator on the character of such editorials and other matter, declaring that within a week after the declaration of war against the German government and continuously to the date of the revocation of the second-class privilege, the relator had published "articles which contained false reports and false statements published with the intent to interfere with the success of the military operations and to promote the success of our enemies and to obstruct the recruiting and enlistment service," and for this cause, exercising a power which had been invested in the postmaster general by statute for almost forty years and frequently exercised by his predecessors, he revoked the second-class privileges which had been granted to the relator.

A demurrer was interposed to the answer of the Postmaster General and overruled, the relator stood by his demurrer, petition for mandamus was dismissed and an appeal taken to the Court of Appeals of the District, where the judgment was affirmed. A writ of error was then sued out from the Supreme Court on the ground that a constitutional question was involved.

Mr. Justice Clarke delivered the opinion of the court and, with regard to the exercise of the right to revoke and after reviewing the facts in regard to the revocation, said:

> This is neither a dangerous nor an arbitrary power, as was argued at the bar, for it is not only subject to review by the courts (the claim of the relator was heard and rejected by two courts before this re-examination of it in this court), but it is also subject to control by Congress and by the President of the United States. Under that constitution, which we shall find it vehemently denouncing, the rights of the relator were, and are, amply protected by the opportunity thus given it to resort for relief to all three departments of the government, if those rights should be invaded by any ruling of the Postmaster General.

Reviewing the character of the publications set forth in the Postmaster General's answer as to the justification of his action, the court said:

> These publications were not designed to secure amendment or repeal of the laws denounced in them as arbitrary and oppressive, but to create hostility to, and to encourage violation of, them. Freedom of the press may protect criticism and agitation for modification or repeal of laws, but it does not extend to protection of him who

counsels and encourages the violation of the law as it exists. The Constitution was adopted to preserve our government, not to serve as a protecting screen for those who while claiming its privileges, seek to destroy it.

Without further discussion of the articles, we cannot doubt that they conveyed to readers of them false reports and false statements, with intent to promote the success of the enemies of the United States, and that they constituted a wilful attempt to cause disloyalty and refusal of duty in the military and naval forces, and to obstruct the recruiting and enlistment service of the United States, in violation of the Espionage Law, . . . and that therefore their publication brought the paper containing them within the express terms of title XII of that law, declaring that such a publication shall be "non-mailable," and "shall not be conveyed in the mails or delivered from any postoffice or by any letter carrier."

While written more adroitly than the usual pro-German propaganda of that time, they nevertheless prove clearly that the publisher of these articles was deliberately and persistently doing all in its power to deter its readers from supporting the war in which our government was engaged, and to induce them to lend aid and comfort to its enemies. The order of the Postmaster General not only finds reasonable support in this record, but is amply justified by it.

In reply to the contention that, although the Postmaster General might have the authority to revoke the second-class privilege as to a single issue of the paper, he did not have the power to make such an order applicable to the indefinite future, the court reviewed the legislation on that subject and said:

It is a reasonable presumption that the character of the publication as one entitled to the second-class privilege, when thus established, will continue to be substantially maintained, and therefore such a permit is made applicable to the indefinite future. For the same reason, and because it would not be practicable to examine each issue of a newspaper, the revocation of a permit must continue until further order. Government is a practical institution, adapted to the practical conduct of public affairs. It would not be possible for the United States to maintain a reader in every newspaper office of the country to approve in advance each issue before it should be allowed to enter the mails, and when, for more than five months, a paper had contained, almost daily, articles which, under the express terms of the statute, rendered it "non-mailable," it was reasonable to conclude that it would continue its disloyal publications. . . . The order simply withdrew from the relator the second-class privileges, but did not exclude its paper from other classes, as it might have done, and there was nothing in it to prevent reinstatement at any time. It was open to the relator to mend its ways, to publish a paper conforming to the law, and then to apply anew for the second-class mailing privilege. This it did not do, but, for reasons not difficult to imagine, it preferred this futile litigation, undertaken upon the theory that a government competent to wage war against its foreign enemies was powerless against its insidious foes at home. Whatever injury the relator suffered was the result of his own choice; and the judgment of the Court of Appeals is affirmed.

Mr. Justice Brandeis dissented and the purpose of his dissent is perhaps best illustrated by the opening paragraph:

This case arose during the World War; but it presents no legal question peculiar to war. It is important, because what we decide may determine in large measure whether, in times of peace, our press shall be free.

It is impossible within the space here available to give a just conception of his dissenting opinion. He declared himself to be impressed with the importance of the effect of the decision in time of peace and the possibilities that might flow from it when its exercise was not justified by the difficulties of war. He presented in his opinion and in the marginal notes a comprehensive history of the legislation and practice on the subject. He denied that power had been conferred upon the Postmaster General to exclude from the mails; that the second-class rate was confined to newspapers which possess the qualifications prescribed by Congress and that these qualifications, particularly the words "regularly issued," could not be expanded to embrace the character of the contents of the publication.

In answer to the government's contention that the case involves not a right but a privilege, he said:

The contention that, because the rates are non-compensatory, use of the second-class mail is not a right, but a privilege, which may be granted or withheld at the pleasure of Congress, rests upon an entire misconception, when applied to individual members of a class. The fact that it is largely gratuitous makes clearer its position as a right; for it is paid for by taxation.

He also declares the order revoking the second-class privilege to be a punitive and not a preventive measure, that it deprives the relator of business, that its effect is to inflict an unprecedented and unusual penalty and, concluding, he says:

If, under the Constitution, administrative officers may, as a mere incident of the peace-time administration of their departments, be vested with the power to issue such orders as this, there is little of substance in our bill of rights, and in every extension of governmental functions lurks a new danger to civil liberty.

Mr. Justice Holmes joins in the dissent.

(b) Municipal Franchises, Impairment of Contracts.

Detroit United Railway v. *City of Detroit et al.* Adv. Ops. 356.

Mr. Justice Day delivered the opinion of the court.

The plaintiff railway company filed a bill seeking to enjoin the City of Detroit from acquiring or constructing a system of street railways, which had been provided for by an ordinance of the city, with an issue of $15,000,000 of its bonds and approved by a requisite majority at a municipal election. The principal grounds of relief were that the ordinance was not legally adopted by the voters and that, carried into effect, it would deprive the plaintiff of property without due process of law, and that the city by its course of dealing with the company had become estopped to require the removal of its tracks.

Many of the questions presented by the complainant were declared to have been already passed upon in the prior cases between the same parties, (229 U. S. 39 and 248 U. S. 429) and we pass at once to review the opinion of the court on the new questions presented.

It was claimed that the City of Detroit was estopped because of expenditures of large sums of money made with the knowledge and acquiescence of the city authorities since the expiration of the franchises, and it was held that under the provisions of the constitution of Michigan, which prohibit the granting of any public utility franchises not subject to revocation at the will of the municipality until such provision should first receive the affirmative votes of three-fifths of the electors, it was impossible that the acts relied upon as constituting estoppel should give the plaintiff any rights equivalent to a permanent franchise. It was also claimed that the intended and threatened action of the city authorities was intended to force a sale of the company's property at a price much less than its value and that this scheme, if consummated, would work a deprivation of constitutional rights. But on this point the court held that the city had the right to acquire the property on the best terms it could make and that, in view of the expiration of

the franchises, an attempt to carry out such purpose by an offer to buy the property at less than its value would not have the effect to deprive the company of property without due process of law. The bill contained allegations that the voters were misled by the fraudulent conduct of the officials of the city in their efforts to procure the property of the complainant at less than its value by misrepresenting in a circular and otherwise the purpose and effect of the vote to be taken upon the question of acquiring a municipal system of transportation. But it was held that the

> motives of the officials and of the electors acting upon the proposals are not proper subjects of judicial inquiry in an action like this so long as the means adopted for submission of the question to the people conformed to the requirements of the law.

The decree of the District Court dismissing the bill was therefore affirmed. Argued by Mr. Charles E. Hughes for the railway company and by Messrs. Charles E. Wilcox and Alfred Lucking for the City of Detroit.

Taxation.—(a) Exemption of Farm Loan Bonds.

Smith v. Kansas City Title & Trust Co., Adv. Ops. 360.

This case which determined the validity of the Federal Farm Loan Act and the exemption of farm loan bonds from taxation, was argued in January 1920. The court restored the case to the docket for reargument in April 1920; it was reargued in October of that year and decided on February 28, 1921.

A stockholder of the defendant bank filed a bill to enjoin the investment of its funds in Federal farm loan bonds. The District Court for the Western District of Missouri dismissed the bill and an appeal was taken direct to the Supreme Court.

The jurisdiction of the Federal Court to entertain such a bill rested wholly upon the claim that the cause of action set forth arose under the constitution and laws of the United States. There was no diversity of citizenship. Federal jurisdiction was not challenged by the parties to the suit but that question was examined by the court of its own motion. Jurisdiction was the point in the case concerning which the court was in doubt and its members at variance.

In the prevailing opinion Mr. Justice Day quoted from the words of Mr. Chief Justice Marshall in Cohen v. Virginia and in Osborn v. Bank of U. S., as follows:

> A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either . . . and when the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States and sustained by the opposite construction—

citing many other cases in which the foregoing definitions had been followed. The learned Justice summed up the position of the court upon the question of jurisdiction as follows:

> The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, maintaining that the act authorizing them was constitutional, and the bonds valid and desirable investments. The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity. It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. The decision depends upon the determination of this issue.

Referring to the decision of Chief Justice Marshall in "the great cases" of McCulloch v. Maryland and Osborn v. Bank of the U. S., the court held that the power to establish banks for national purposes carried necessarily implied power to enact the legislation under review and that having created these federal agencies as a part of the banking system of the United States with power to become financial agents of the government and depositaries of public moneys, the creation of the Federal joint stock land banks and the national farm associations was within the power of Congress. As to the claim that the attempt to create these Federal agencies was but a pretext intended not to be exercised but to stand merely as the warrant for the doing of things which Congress could not directly have authorized, the learned Justice said:

> Nothing is better settled by the decisions of this court than that, when Congress acts within the limits of its constitutional authority, it is not the province of the judicial branch of the government to question its motives.

Evidently upon the reargument of the case the question principally discussed was that provision of the law which granted exemption from taxes to the securities issued under the law. On this point Mr. Justice Day said:

> That the Federal government can, if it sees fit to do so, exempt such securities from taxation, seems obvious upon the clearest principles. But it is said to be an invasion of state authority to extend the tax exemption so as to restrain the power of the State. Of a similar contention made in McCulloch v. Maryland, Chief Justice Marshall uttered his often quoted statement: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create." . . .
>
> The exercise of such taxing power by the states might be so used as to hamper and destroy the exercise of authority conferred by Congress, and this justifies the exemption. If the states can tax these bonds, they may destroy the means provided for obtaining the necessary funds for the future operation of the banks. With the wisdom and policy of this legislation we have nothing to do. Ours is only the function of ascertaining whether Congress, in the creation of the banks, and in exempting these securities from taxation, Federal and state, has acted within the limits of its constitutional authority. For the reasons stated, we think the contention of the government, and of the appellees, that these banks are constitutionally organized and the securities here involved legally exempted from taxation, must be sustained. It follows that the Decree of the District Court is affirmed.

Mr. Justice Holmes dissented solely on the question of federal jurisdiction and with him concurred Mr. Justice McReynolds. The learned dissenting judges declared that in their view the action did not arise under any law of the United States but wholly under Missouri law. Mr. Justice Holmes said:

> The defendant is a Missouri corporation, and the right claimed is that of a stockholder to prevent the directors from doing an act—that is, making an investment—alleged to be contrary to their duty. But the scope of their duty depends upon the charter of their corporation and other laws of Missouri. If those laws had authorized the investment in terms, the plaintiff would have had no case, and this seems to me to make manifest what I am unable to deem even debatable—that, as I have said, the cause of action arises wholly under Missouri law. If the Missouri law authorizes or forbids the investment according to the determination of this court upon a point under the Constitution or acts of Congress, still that point is material only because the Missouri law saw fit to make it so. The whole foundation of the duty is Missouri law, which, at its sole will, incorporated the other law as it might incorporate a document. The other law or docu-

ment depends for its relevance and effect not on its own force, but upon the law that took it up; so I repeat once more, the cause of action arises wholly from the law of the state.

Ordinarily the opinions and dissenting opinions of the Supreme Court bear internal evidence of an effort to reconcile the divergent views or, failing such reconciliation, to disclose the considerations which support the opposing views. In this case Mr. Justice Holmes makes his own position very clear, but does not attempt to point out what he conceives to be the error in the application of the cases relied on in the prevailing opinion, and while the prevailing opinion shows clearly enough the grounds upon which its conclusions with regard to jurisdiction rests, it does not attempt to answer the contention of Mr. Justice Holmes that the case arises under Missouri law. Deprived of the value of such judicial criticism, it may perhaps be permitted to express a doubt as to whether or not a case can be said to arise under the laws of a state merely because the corporation is created by the laws of that state and the duties of its directors imposed by such law, where it also appears that the duties of the directors must necessarily be affected and perhaps controlled by the conclusion which is reached as to the effect of a law of the U. S., and where the record of the case shows that the action of the directors is challenged on the sole ground that they are about to act under the warrant of a Federal statute which is alleged to be repugnant to the Federal Constitution. Possibly the importance of an early decision of the questions involved in this case, recognized in the opening sentence of the dissenting opinion, may account for what seems to be the willingness of the members of the court to express their respective views and to forego the efforts to come to an accord, which are so marked a characteristic of this great tribunal.

The case was argued by Messrs, William Marshall Bullitt and Frank Hagerman for the appellant and by Messrs. Charles E. Hughes and George W. Wickersham for the appellees.

(b) Estate Tax, Interest of Donee Under Power of Appointment.

United States v. *Stanley Field, Exr.*, Adv. Ops. 335.

This is an appeal from a judgment of the Court of Claims sustaining a claim for the refund of an estate tax exacted under the Revenue Act of Sept. 1916, as amended March 3, 1917, and presents two questions: First, the character of the interest which passed under the testamentary execution, after the passage of the Act, of a power of appointment created prior to such passage. Joseph Field of Illinois died in April 1914, leaving a will which set aside certain property as a separate trust fund for the benefit of his wife, Kate Field, for life, and providing that after her death the income of a portion of said fund should be paid to such persons as she should appoint by last will and testament. She died in April 1917, leaving a will by which she executed the power of appointment in favor of her then surviving children. The Collector of Internal Revenue included as part of the gross estate of Kate Field that part of the estate which passed under her execution of the power of appointment. The executor paid this portion of the tax under protest and, having made a claim for a refund which was rejected by the Commissioner of Internal Revenue, brought this suit in the Court of Claims and recovered judgment. The opinion was delivered by Mr. Justice Pitney and, after stating the facts and quoting the pertinent provisions of the Revenue Act of 1916 and the amendment of 1917, he said:

> Applying the accepted canon that the provisions of such acts are not to be extended by implication . . . we are constrained to the view—notwithstanding the administrative construction adopted by the Treasury Department—that the Revenue Act of 1916 did not impose an estate tax upon property passing under a testamentary execution of a general power of appointment. . . .
>
> The taxable estate must be (1) an interest of the decedent at the time of his death, (2) which, after his death, is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

He referred to the rule established in England and followed generally, but not universally in this country, that where one has a general power of appointment and executes the power, equity will regard the property appointed as part of his assets for the payment of his creditors in preference to the claims of his voluntary appointees, but called attention to the fact that the existence of the power did not of itself vest any estate in the donee; that where the donee died indebted, having executed the power in favor of volunteers, the appointed property is treated as equitable, not legal, assets of his estate and if it passes to the executor at all, it does so not by virtue of his office but as a matter of convenience, because he represents the rights of creditors. In such case creditors of the donee can lay claim to the appointed estate only to the extent that the donee's own estate is insufficient to satisfy their demands; that creditors have no redress in case of a failure to execute a power of appointment and that whether the power be or be not exercised, the property that was subject to appointment is not subject to distribution as part of the estate of the donee. He then concludes this branch of the case in which numerous English and American cases are cited by the statement:

> It follows that the interest in question, not having been the property of Mrs. Field at the time of her death, nor subject to distribution as part of her estate, was not taxable under clause (a).
>
> We deem it equally clear that if was not within clause (b). That clause is the complement of (a), and is aptly descriptive of a transfer of an interest in decedent's own property in his lifetime, intended to take effect at or after his death. It cannot, without undue laxity of construction, be made to cover a transfer resulting from a testamentary execution by decedent of a power of appointment over property not his own.

The judgment of the Court of Claims holding the tax unsupported by the taxing act and awarding reimbursement was accordingly affirmed. The case was argued by Attorney General Davis and Solicitor General Frierson for the Government, and by Mr. John P. Wilson for the executor of the Field estate.

(c) Occupation or Property Tax?

Chas. I. Dawson v. *Kentucky Distilleries & Warehouse Co.*, Adv. Ops. p. 326.

In 1920 a law was duly enacted which imposed on every person engaged in the business of manufacturing whiskey, or owning and storing the same in warehouses, an annual license of 50 cents a gallon on all whiskey withdrawn from bond or transferred in bond from Kentucky to a point outside that state.

Complainants filed a bill to enjoin the enforcement of this law. The case was heard on motion for interlocutory injunction before three judges. The complainants contended in each case that the statute was void under the State and Federal Constitutions. The government claimed that the suits should be dismissed for want of equity because there was an adequate remedy at law. The District Court granted the injunction, holding that there was no adequate remedy at law, that the statute was repugnant to the Constitution of the State because it was a property tax not uniform in its operation and was confiscatory.

The opinion was delivered by Mr. Justice Brandeis. The Attorney General's contention was that the tax was a license tax upon "the business of manufacturing" distilled spirits and upon "the business of owning and storing such spirits in bonded warehouses." The learned Justice states the controlling question as follows:

> The question is whether . . . this fifty cents a gallon tax is an occupation tax or is a property tax. The question is one of local law so that a decision of it by the highest court of the State would be accepted by us as conclusive, but the validity of the statute does not appear to have been passed upon by any Kentucky court. We are, therefore, called upon . . . to determine this question of State law.
>
> The name by which the tax is described in the statute is of course immaterial. Its character must be determined by its incidents; and, obviously, it has none of the ordinary incidents of an occupation tax. . . . So long as the whiskey is stored in bond within the State it is free of the tax. One may own and store the whiskey for years in the hope of selling it at a profit, and yet be free from any obligation ever to pay this tax, if, before its removal from bond within the state, the whiskey is sold to another, or if, while so owned, it is destroyed or forfeited to the government. . . .
>
> As stated by the lower court, "the thing really taxed is the act of the owner in taking his property out of storage into his own possession (absolute or qualified), for the purpose of making some one of the only uses of which it is capable; i. e., consumption, sale, or keeping for future consumption or sale. The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value." To levy a tax by reason of ownership of property is to tax property. . . . It cannot be made an occupation or license tax by calling it so.

He next takes up the contention that the bill should have been dismissed because of an adequate remedy at law. He cites cases to show that at the time this suit was brought it was doubtful under the decisions of the highest court of the State whether, if this tax were paid under protest, an action at law would lie to recover it and said:

> It is well settled that "if the remedy at law be doubtful a court of equity will not decline cognizance of the suit." . . . Nor is the equitable jurisdiction lost because since the filing of the bill an adequate legal remedy may have become available.

He next discusses the contention that the suits should have been abated under the provisions of Sec. 266 of the Judicial Code, which declares that if before the final hearing of an application to restrain the enforcement of the statute, a suit shall have been brought in a state court to enforce such statute, accompanied by a stay of proceedings under such statute, all proceedings in the United States courts to restrain the enforcement of such statute shall be stayed pending the final determination of the suit in the state court.

A suit had been brought in the state court to enjoin the authorities from compelling the plaintiff or the warehouse men to pay the tax in question and a restraining order to that effect had been issued. In regard to this suit the court said:

> Strictly speaking it was not "brought to enforce" the statute in question, but it is at least arguable that it might have been accepted by the state officials as a means to that end, and so have fulfilled in substance the statutory requirement. . . . But whether this is true or not, it was not "accompanied by a stay in such state court of proceedings under such statute," within the meaning of the Judicial Code. The stay contemplated by Congress is a general one which would protect among others those who had already sought protection in the Federal court. The restraining order issued in the purely private litigation between third parties in the county court left the plaintiffs in the suits before us subject to all the danger of irreparable injury against which they had sought protection in the Federal courts.

The judgment of the District Court was accordingly affirmed. Argued by Mr. Charles I. Dawson, Attorney General of the State of Kentucky *pro se* and by Messrs. W. Overton Harris, William Marshall Bullitt, Thomas Kennedy Helm and Levi Cooke for the complainants.

(d) Occupation, Tax on Interstate Commerce.

Postal Telegraph-Cable Co. v. *Fremont*, Adv. Ops. 377.

The City of Fremont, Neb., levied a license tax on business and occupations within the city, including a tax of $60 per year on the business of receiving and sending intra-state messages to and from the city. The Telegraph Company defended a suit for the collection of this tax on the ground that it was compelled by its charter to do intra-state as well as inter-state telegraphing; that its profits from its intra-state business were less than the amount of the tax in question; that if required to pay such tax, it would be compelled to make up the deficiency from the proceeds of its inter-state business; that the tax was confiscatory, prohibitive, deprived the company of its property without due process of law and was repugnant to the Federal Constitution. It also alleged that its payment of the tax in prior years had been made by mistake and inadvertence of its employees and without any intention to recognize the legality of the tax. Judgment was recovered by the city and was affirmed by the Supreme Court of the State. This case came before the Federal Supreme Court on writ of error to the Supreme Court of Nebraska.

Mr. Justice McKenna delivered the unanimous opinion of the court. After stating the respective contentions of the parties and the views of the Supreme Court of the State he said:

> In this case the tax is $60 a year. It certainly cannot be said that it is repellent from its amount, and there is no pretense that its imposition "is a disguised attempt to tax interstate commerce." The Postal Company, when it entered the city, the ordinance levying the tax then being in existence, did not declare against its legality, or complain of its detrimental operation. Indeed, for the privilege of entering the city it subjected itself to further regulation, licensing, and taxing. And it paid the tax from that time until 1914. The allegation in its answer that it paid the tax "through the mistake and inadvertence of" its "clerical force" we are not disposed to accept, without more, as an explanation.

The learned Justice expressed the view that the mere proof of loss on intra-state business for two years determined nothing, in the absence of a showing what business was available to the company or what the facilities it had used and that the company could have relieved itself from any real burden by application to the state railway commission for an increase in

its intra-state rates. The judgment of the Supreme Court of Nebraska was accordingly affirmed.

Argued by Mr. John N. Sebree, Jr., for the Telegraph Co. and by Mr. Robert E. Evans for the City of Tremont.

(e) Income Tax, on Gains Derived from Single Isolated Sales.

Merchants Loan & Trust Co. v. *Smietanka,* Adv. Ops. p. 445.

Plaintiff in error, as trustee of the estate of Arthur Ryerson, brought suit to recover an assessment of taxes under the Income Tax of Sept. 8, 1916, paid under protest, and the claim to recover was based upon the contention that the fund taxed was not income within the scope of the Sixteenth Amendment. The District Court for the Northern District of Illinois sustained a demurrer to the declaration and the trustee sued out a writ of error to the Supreme Court to review the judgment.

Upon the death of Arthur Ryerson in 1912 the trustee acquired custody of shares of stock of Jos. T. Ryerson & Son, a corporation of which the cash value on March 1, 1913 was $561,798. In February 1917 they were sold for $1,280,996.64. The Commissioner of Internal Revenue treated the difference between these two sums as income for the year 1917.

Mr. Justice Clarke delivered the opinion of the court, and stated the question involved as follows:

> The ground of the protest, and the argument for the plaintiff in error here, is that the sum charged as "income" represented appreciation in the value of the capital assets of the estate which was not "income" within the meaning of the 16th Amendment. . . .
>
> It is first argued that the increase in value of the stock could not be lawfully taxed under the act of Congress because it was not income to the widow, for she did not receive it in 1917, and never can receive it; that it was not income in that year to the children, for they did not then, and may never, receive it; and that it was not income to the trustee, . . . because, in the "common understanding" the term "income" does not comprehend such a gain or profit as we have here, which, it is contended, is really an accretion of capital, and therefore not constitutionally taxable under Eisner v. Macomber.

Reviewing the language of the act, the learned justice held that if the fund was "income" it came squarely within the words "derived from . . . sales or dealings in property," as well as the words "derived from any source whatever," and that the trustee was "a taxable person" within the meaning of said act, and restated the sole remaining question as follows:

> There remains the question, strenuously argued, whether this gain in four years of over $700,000 on an investment of about $500,000 is "income" within the meaning of the 16th Amendment to the Constitution of the United States.

Reviewing all the prior cases, the court adheres to the definition formulated in Eisner v. Macomber, 252 U. S. 189, 207:

> This definition, frequently approved by this court, received an addition, in its latest income tax decision, which is especially significant in its application to such a case as we have here, so that it now reads: "Income may be defined as the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through sale or conversion of capital assets."

As to the argument that the word "income" does not include the gain from capital realized by single isolated sale of property, but that only the profits realized by one engaged in buying and selling as a business constitute income which may be taxed, the court said:

> It is sufficient to say of this contention, that no such distinction was recognized in the Civil War Income Tax Act; . . . that it was not recognized in determining income under the Excise Tax Act of 1909, as the cases cited supra show; that it is not to be found, in terms, in any of the income tax provisions of the Internal Revenue Acts of 1913, 1916, 1917 or 1919; . . . that the definition of the word "income" as used in the 16th Amendment, which has been developed by this court, does not recognize any such distinction; that in departmental practice, for now seven years, such a rule has not been applied; and that there is no essential difference in the nature of the transaction, or in the relation of the profit to the capital involved, whether the sale or conversion be a single, isolated transaction or one of many. The interesting and ingenious argument, which is earnestly pressed upon us, that this distinction is so fundamental and obvious that it must be assumed to be a part of the "general understanding," of the meaning of the word "income," fails to convince us that a construction should be adopted which would, in a large measure, defeat the purpose of the Amendment.

The learned Justice declared that Gray v. Dalington, much relied upon in the argument, had already been sufficiently distinguished; that in Lynch v. Turrish the questions here discussed and decided were not presented, and that the British income tax decisions arose under statutes so different from the acts of Congress here considered that they were quite without value in arriving at the construction of the laws here involved. The judgment of the District Court was accordingly affirmed.

Eldorado Coal & Mining Company v. *Mager,* argued by Mr. Herbert Pope for plaintiff in error, which involved the same questions, was affirmed on the authority of the foregoing case.

Goodrich v. *Edwards,* argued by Mr. William D. Guthrie, was affirmed as to one item of the tax sued for, on the authority of the Merchants Loan and Trust Co. case, and reversed as to another item where the tax was assessed on a transaction in which property acquired in 1912, of a then cash value of $291,600, which on March 1, 1913, had depreciated to a value of $148,635.50, was sold in 1916 for $269,346.50. Although the owner of this property lost more than $20,000 on the actual transaction, he had been compelled to pay a tax on a purely theoretical gain of over $120,000 which he did not realize.

The government by the Solicitor General, confessed error with respect to the assessment of this item and the court announced its concurrence with his views, saying:

> It is thus very plain that the statute imposes the income tax on the proceeds of the sale of personal property to the extent only that gains are derived therefrom by the vendor; and we therefore agree with the Solicitor General that since no gain was realized on this investment by the plaintiff in error, no tax should have been assessed against him.

Walsh v. *Brewster,* argued by Messrs. William D. Guthrie and Henry F. Parmelee, in which the judgment of the District Judge for the district of Connecticut provoked such nation-wide attention, and was followed with the hopes and prayers of so many saints and sinners, was disposed of in harmony with the foregoing cases.

The decision of this important group of cases clears up much of the controversy as to the method of computing income from sales, but it is too much to hope that other questions in regard to the computation of such income will not be raised.

ARRANGEMENTS FOR CINCINNATI MEETING

THE officials of the American Bar Association have recently completed arrangements for meeting places and hotel accommodations at Cincinnati, Ohio, in connection with the annual meeting of the Association which will be held there on August 31, September 1 and 2, 1921. They were materially assisted by Province M. Pogue, President of the Cincinnati Bar Association, and by Ben B. Nelson, Fourth National Bank Bldg., Cincinnati, Ohio, who has kindly consented to take charge of arrangements for hotel reservations for members and guests of the Association. A list of Cincinnati hotels showing rates and locations will be found on page 259 of this issue.

The following preliminary arrangements are announced:

(a) Headquarters of the Association will be established at the Hotel Sinton. The Secretary's and Treasurer's offices will be located in the Tea Room, just off the lobby on the main floor, adjoining the Ball Room.

(b) The sessions of the Association, except one, will be held in the Ball Room of the Hotel Sinton. The President's reception on Wednesday evening, August 31, will be given in the Ball Room at the Sinton. This necessitates holding the Wednesday evening session of the Association in the Convention Hall of the Hotel Gibson.

(c) The annual dinner of the Association will be held in the Convention Hall, Hotel Gibson, on Friday evening, September 2.

(d) The meetings of the Executive Committee of the Association and of the General Council of the Association will be held in Parlor F, Hotel Sinton.

(e) The Conference of Commissioners on Uniform State Laws will hold its sessions in the Convention Hall, Hotel Gibson, commencing August 24.

(f) The Section of Bar Association Delegates will meet in the Ball Room of the Hotel Sinton on August 30.

(g) The Section of Legal Education will meet in Rooms 3 and 4 (Ball Room Floor) Hotel Gibson.

(h) The Section of Public Utility Law will meet in Room 7 (Ball Room Floor) Hotel Gibson.

(i) The Judicial Section will meet in Rooms 5 and 6 (Ball Room Floor) Hotel Gibson.

(j) The Comparative Law Section will meet in Parlor G (Mezzanine Floor) Hotel Sinton.

(k) The Section of Patent Law will meet in Parlor H (Mezzanine Floor) Hotel Sinton.

(l) The Section of Criminal Law will meet in Parlor H (Mezzanine Floor) Hotel Sinton.

Later announcement will be made as to the number and dates of meetings of the various Sections above mentioned (g) to (l).

The Executive Committee of the Ohio State Bar Association have decided to hold the annual meeting of the Ohio State Bar Association in conjunction with the American Bar Association, it being agreed that the Ohio State Bar Association shall have its main session on the afternoon of Wednesday, August 31, to which meeting members of the American Bar Association are to be invited. The members of the Ohio State Bar Association are to be invited to attend all the sessions of the American Bar Association.

Arrangements have been made with the Railroads whereby members of the American Bar Association and dependent members of their families who attend the annual meeting will have the benefit of A FARE AND ONE-HALF. They will pay *full fare going to Cincinnati*, and, upon purchasing railroad ticket, will ask for a certificate, which will be viséd by the Secretary at Cincinnati, thus entitling the holder to *half fare on the return trip*. Further details of the plan are given in the following statement furnished by an official of the Central Passenger Association. The dates for ticket sales will, of course, vary in the different Passenger Association territories:

The following directions are submitted for your guidance:

1. Tickets at the regular one-way tariff fare for the going journey may be obtained on any of the following dates (but not on any other date) Aug. 23-24 and Aug. 27-Sept. 2, 1921. Be sure that, when purchasing your going ticket, you request a CERTIFICATE. *Do not make the mistake of asking for a "receipt."*

2. Present yourself at the railroad station for ticket and certificate at least thirty minutes before departure of train on which you will begin your journey.

3. *Certificates are not kept at all stations.* If you inquire at your home station, you can ascertain whether certificates and through tickets can be obtained to place of meeting. If not obtainable at your home station, the agent will inform you at what station they can be obtained. You can in such case purchase a local ticket to the station which has certificates in stock, where you can purchase a through ticket and at the same time ask for and obtain a *certificate* to the place of meeting.

4. Immediately upon your arrival at the meeting present your certificate to the endorsing officer, Mr. W. Thomas Kemp, as the reduced fare for the return journey will not apply unless you are properly identified as provided for by the certificate.

5. It has been arranged that the Special Agent of the carriers will be in attendance on August 31-September 2, from 8:30 a. m. to 5:30 p. m., to validate certificates. If you arrive at the meeting and leave for home again prior to the Special Agent's arrival, or if you arrive at the meeting later than September 2, after the Special Agent has left, you cannot have your certificate validated and consequently you will not obtain the benefit of the reduction on the home journey. It is inferred that you will wish to attend all the sessions of the convention, and that you will, if possible, be present commencing the opening date of the meeting. However, so far as the validation of certificates is concerned, you should so time your going trip as to enable you to present certificate for validation prior to departure of the Special Agent of the railroads on the last validation date above named, for, while provision is made for validation of certificates if the required minimum of 350 are presented, as explained in the next paragraph, a reduced fare ticket on the return trip is obtainable only upon surrender of a validated certificate. Certificates will be validated only on the dates above named, and during the office hours indicated. *No refund of fare will be made on account of failure to either obtain a proper certificate nor on account of failure to have the certificate validated.*

6. So as to prevent disappointment, it must be understood that the reduction on the return journey is not guaranteed, but is contingent on an attendance of not less than 350 members of the organization at the meeting and dependent members of their families, holding regularly issued certificates obtained from ticket agents at starting points, showing payment of regular one-way tariff fare of not less than 67 cents on going journey.

7. If the necessary minimum of 350 certificates are presented to the Special Agent, and your certificate is duly validated, you will be entitled up to and including Sept. 6 to a return ticket via the same route over which you made the going journey, at one-half of the regular one-way tariff fare from the place of the meeting to the point at which your certificate was issued.

8. Return ticket issued at the reduced fare will not be good on any limited train on which such reduced fare transportation is not honored.

SOME CRITICISMS OF LEGAL EDUCATION

Ranging From Complaint That It is Not Practical Enough to Charge That It is Narrow, Vocational, Utilitarian and Does Not Fit Graduates for Larger Duti es*

By Eugene A. Gilmore
Professor of Law, University of Wisconsin

CRITICISM of the law and its administration is perennial; likewise criticism of legal education, law schools, and law teaching. In his annual address as President of the Association of American Law Schools, in 1912, Professor Roscoe Pound, now dean of the Harvard Law School, said:

> The conflict between our law and those who are working for social progress has its roots ultimately in our teaching of the law. . . . It is not the recall of judges or the recall of judicial decisions that should be invoked, but rather the recall of law teachers, or at least recall of a great deal of law teaching. . . . While the rest of the world is imbued with faith in the efficacy of effort, and while, under the stimulus of that faith, advance and achievement are the order of the day, in every other field of learning, it is too true that the legal scholar is busied chiefly with threshing over old straw.[1]

He thus elaborates his criticism: There is a traditional mode or habit of thinking upon legal questions, which is acquired in the impressionable period of the student's life and becomes a part of his mental equipment as a lawyer. The traditional principles arrived at by this method of thinking are taken to be fundamental principles of all law. It is assumed that the only measure of critique of legal rules is an ideal development of these traditional principles. All questions are looked at from the standpoint of this received juristic tradition. Subconsciously all new elements of the law are molded thereto. Legislation at variance with these traditions is viewed with indifference and suspicion, if not with hostility. Persistency by law teachers in training men in this mode of juristic thinking and in teaching these traditional principles as universals of all law makes for a rigid body of law out of harmony with prevailing notions concerning social interests and social progress. Moreover, this method of teaching is responsible for the attitude of our law towards legislation, which attitude wholly ignores the imperative element and treats the law as if it consisted of the traditional element only. Further, our traditional law is individualistic and regards its end as the protection of individual interests; whereas, the center of modern juristic theory is no longer the individual; it is society.

On other occasions the author of the above criticism has pointed out the mechanical and artificial quality of much of our traditional common law as it is taught and administered. It is a jurisprudence of fixed conceptions from which a body of rules is derived by a simple process of deduction, or which are sometimes used not as premises from which to reason, but as ultimate solutions. Our law teaching is too much a teaching of these fixed conceptions with inadequate consideration of whether the reasons behind the conceptions still exist as applicable to modern conditions of social and economic life.[2]

Another criticism, aimed especially at law schools rather than at law teaching, is as follows:

> The law schools . . . have never faced their problems. . . . The only development that has been made during a century in the American law schools has consisted, speaking generally, in raising the standard of admission and in extending the period of study. There is only one innovation of significant and essential importance that has been introduced. . . . This innovation was in the method of instruction. . . . The American law school is neither extensive nor intensive enough. It does not, on the one hand, lay a broad foundation in the history and theory of law, the rationale of legal institutions; nor, on the other hand, does it prepare with precision and definiteness the student with the technique and special equipment for the practice of his profession. [3]

The second branch of this criticism—that the law school training is not intensive enough and does not prepare with definiteness and precision the student with the technique and special equipment for the practice of law—involves what is desirable and feasible in professional education in law schools. That it is the primary function of the law schools to teach men to practice law and to practice it as it is and not as it ought to be or might be is admitted. There has been, however, and still is, difference of opinion as to the best method of reaching this result. While the inveterate delusion that law is a handicraft to be practiced by rule of thumb and learned only by apprenticeship in an office or in a school so intensely utilitarian as to afford little more than an apprenticeship still exists in certain quarters, the prevailing opinion is that the longest way round is the shortest way through. A broad, comprehensive course in the fundamentals of law, pursued in a good law school, leads more certainly, if not more quickly, to the technical and detailed knowledge and capacity requisite for the practice of law as it actually is than the immediate and direct utilitarian apprenticeship in the office or in the excessively vocational law school. Moreover, the view that law can be practically taught by men who devote their time entirely to such work is of very wide acceptance. It is not necessary to consider whether law can be learned in any other way or taught by any other type of teacher. Suffice it to say for present purposes that so far as legal education lacks immediate practicality, the lack is not due to the fact that law is taught in law schools or by professional teachers.

The author of the above criticism, however, had particularly in mind three matters: First, that our law schools, especially those connected with state universities, do not pay sufficient attention to the law of the jurisdiction where they are located; second, that they do not give due consideration to the statutory law; third, that they do not devote sufficient time to teach-

*Portions of the annual address of the President of the Association of American Law Schools, delivered in Chicago, December, 1920.

(1) American Law School Association, Proceedings, 1912, pp. 55, 60.

[2] 8 Columbia L. Rev. 605.

[3] Professor W. C. Jones, 1 Calif. L. Rev. 1.

ing practice. The moot court, the practice court, the legal clinic, the office apprenticeship, courses in office practice and in conveyancing and in the drafting of papers, the case book dealing primarily with local law, a course in statutes, have all received consideration by those interested in legal education and much is being done in these matters. That the practical side of our legal education can be much improved by the further utilization of some or all of the above methods is clear. It is also clear that no law school can, without an undue sacrifice of time better devoted to other things, turn out graduates thoroughly versed and entirely at ease in all the details of practice. A certain amount of adaptation must be done by the student in his first months at the bar.

Turning to the other branch of the criticism—that our legal education is not extensive enough, that it does not lay a broad foundation in the history and theory of law and in the rationale of legal institutions—this involves two matters: First, preliminary and general education before taking up the study of law; second, the scope, content, and length of the professional course. Both of these matters have been frequently considered in the Association of American Law Schools and other organizations. With respect to preliminary education, especially so far as members of the Law School Association are concerned, very substantial and satisfactory progress has been made during the past twenty years. Due to the Association's example and to its activity, there has been a marked advance in preliminary education standards in all the law schools. There are still, however, some schools that either have no requirements at all or are content with a "common school education," a "general education sufficient to carry on the work of the school," or "sufficient discretion to satisfy the dean of the school that the student is qualified to study law." Until the bar examiners or those empowered by law to fix standards insist upon a specified minimum of general education before the study of law is begun, it is not likely that schools of the latter type will voluntarily advance standards.

With respect to the length of the professional course, three years is the accepted minimum. Of the 145 law schools in the United States, only 18 maintain courses shorter than three years. Of these, seven are two-year day schools; ten, two-year night schools; one, a one-year day school. Of the 54 schools offering work entirely in the late afternoon or evening, 14 maintain a four-year course. Of the nine schools offering both day and evening courses, five prescribe four years for the night course.

The criticism that the course in professional training is not extensive enough may have reference to the amount of time to be devoted to it or to the content of the course or to both. A more extensive course might well involve more time and a substantial change in content. There are now, indeed, many who feel that the time has arrived for extending the period of study to four years. At a joint meeting of the Section of Legal Education of the American Bar Association and of the State Bar Examiners, held in 1916, a resolution was adopted favoring the extension of the period of law school study to four years. In 1919 the Executive Committee of the Association of American Law Schools submitted the following report on the four year course:

> The constantly increasing complexity of our law and the introduction of a number of practically new topics has so crowded the law school curriculum as to make it impossible for even the most ambitious student to cover adequately in three years, all, or nearly all, of the most important courses in substantive law.
>
> With a few exceptions, American law schools have, of late, felt it their duty to provide courses in Practice and Procedure, which courses consume from one-sixth to one-fourth of the student's time during his third year, and cause a corresponding reduction in the amount of time available for the study of topics of substantive law.
>
> The law students of one generation become the executive officers, legislators, judges and leaders of public opinion of the next generation. Accordingly, it behooves the law schools not only to train students to practice their profession at the bar, but also to equip them in some measure to discharge these larger duties which will necessarily be thrust upon a great number of their graduates. In recognition of this function, there is now an insistent demand that courses in Roman Law, History of the Law, Jurisprudence, Comparative Law, Administrative Law, Legislation and International Law be offered in our law schools, and that a considerable proportion of these courses be required of all candidates for the law degree.
>
> It is the opinion of the Executive Committee that these reasons lead inevitably to the conclusion that, if the law schools of this Association are to do their full duty to the bar and to the commonwealth, the law school course must be extended to four years.

By some these new courses in the proposed extended curriculum are designated as "quasi-legal" or "cultural" courses. Others regard them as essentially legal courses, which should be included in any law curriculum adequate to prepare lawyers for the next generation.

This divergence of view makes pertinent the statement of certain other criticisms of legal education; for after all the origin of the criticism may be in the difference in view as to what is included in the function of the lawyer and of what his education should consist and of what is the proper end of legal education. For example, it is said that the work of the law school is now so fully established in public estimation that the time is at hand for considering what is the ultimate function of the law teacher as a factor in the complex social order. The primary and recognized function is to prepare men by technical training in law to be efficient practititioners. The secondary and ultimate function of the law teacher is "to serve as an efficient agency in bringing about the wise, comprehensive, and prompt adaptation of our law and procedure to the new and changing needs of society."[4]

The time has now arrived for the "study of the law for scientific purposes with reference to ultimate law improvement rather than exclusively for professional training."[5]

Again, it is said that "law teachers ought to be making it clear to the public what law is and why law is and what law does and why it does so."[6] "The escape from the 'artificial reason and judgment of law' is in the law schools. We must train the rising generation of lawyers in a social, political, and legal philosophy abreast of our times."[7]

Furthermore, "We must, so far as we may, improve the art of teaching law, and we must continue to study the separate branches of our science, each laboring to advance knowledge in his own field of study. But, in addition to this, we are called to a more modern task: to bring the law into closer relation with the needs of contemporary life . . . We must adjust the law to the requirements of the people or the people to the requirements of the law; in short,

4. Professor W. F. Vance, Annual Address, 1911, Proc. A. A. L. S., 88.

5. Annual Report, 1917, Dean H. F. Stone, Columbia University Law School.

6. Dean Pound, 19 G. B., 608.

7. Dean Pound, 5 Columbia L. Rev. 339, 351-53.

we must reform the law or inform the people who are subject to it . . . We must teach ourselves, the bar, the people generally."[8]

There is one further criticism which, while relating to a defect in the law itself, is laid at the door of the law teacher, because he is said to be peculiarly fitted by training and status to remove it: "There is a lack of any real system of law. Our law is rather a congeries of subjects worked out independently in detail than a true system."[9] This lack of system produces serious results in the teaching of law and in its effective administration.

There is another criticism of a different sort but which involves essentially the question as to what is included within the function of the lawyer and of what this education should consist. Our present system of education "fails to produce lawyers who come to the work of their profession with any idea that the profession as such has any public duties to perform."[10] While lawyers as a class have a real sense of duty towards clients, towards the court, towards their fellow lawyers, they have no sense of any professional or class duty towards the community as a whole to work for the better administration of justice. A distinction should be drawn between the private duties of the individual members of the profession and the public duties which rest upon the profession as a profession. "The problem—How should I try this case?—and the problem—How should cases be tried?—are distinct problems."[11] Legal education has concerned itself with the former and not at all with the latter. There is a failure to perceive clearly the public professional duties and to appreciate adequately their scope and significance. This failure is attributable to our system of legal education, which is concerned primarily with teaching men how to look after the interests of their clients under the existing legal order.

Obviously the foregoing criticisms, if they mean anything, mean a fundamental change in legal education as to its scope, content, and purpose. They mean that the transition from an individualistic to a social idea of justice is to effect organic changes in legal education; that the socialization of juristic conceptions must produce a corresponding socialization in the profession of the lawyer; that he pursues his calling no longer as a strictly private one, but as a calling "affected with a public interest" which carries substantial obligations to the community. The enlarged program which in the foregoing quotations is laid out for the law teachers and law schools cannot effectively be accomplished without substantial changes in our existing system of legal education. The alleged inadequacy of the present system is based not so much upon a lack of instruction in what someone has designated as "old time law," as distinguished from "quasi-law," but rather upon a lack of instruction in those matters and in that manner which is necessary to produce a "rising generation of lawyers trained in a social, political, and legal philosophy, abreast of their times." To some this may mean a change of our schools of law into schools of philosophy, of sociology, of political science, and of economics, and we are warned that "there is grave danger that in the efforts to transform the professional law school into a school of jurisprudence we shall lose the substance of the one in grasping at the shadow of the other.[12] This is a counsel of caution, but not of perfection.

In the face of these criticisms one of two things should be done: Either deny them and demonstrate that they are ill-founded and impracticable and that our present three-year professional course as organized and taught accomplishes all that can properly be expected of law schools or that it is feasible for them to attempt, in view of the existing opinion in the profession and in the public as to standards of legal education; or admit their soundness and set about seriously to remove the deficencies which they impute. Possibly, there is a third course open; ignore the criticisms and continue to teach the traditional law analytically and historically.

It would seem, however, that the time has arrived for action. We have been doing lip service for many years to a larger program of legal education. In addresses before the American Bar Association, State Bar Associations, the Section of Legal Education, and before the Association of American Law Schools we have been told repeatedly that our legal education is narrow, vocational, utilitarian and inadequate to fit our graduates for the large and complex duties which confront them as members of a learned profession in these times of great transition and reconstruction. Moreover, we have been told all this by the heads and prominent faculty members of the leading law schools and by distinguished members of the bench and bar, and yet, notwithstanding all this talk our narrow vocational method of legal education remains substantially unchanged; the law school course of two, or more usually three years, with its standardized curriculum of traditional subjects taught in the traditional utilitarian spirit, continues.

Why, it may be asked, should the shortcomings of the legal profession, of the law and its administration, be laid at the doors of the law teachers and the law schools? Why should they, any more than the judges and active practitioners, be charged with removing the lack of harmony between the law and the prevailing notions of social needs and social progress and bringing legal thought and popular thought into accord? Because, it is said, they are so circumstanced as to be best able to accomplish the task. Is it not, however, an unwarranted assumption on the part of law teachers that the task belongs especially to them, and that they are peculiarly fitted by status and training to undertake it? There are doubtless many members of the active profession who would regard the assumption as unwarranted and who would consider the law teachers as too far removed from practical affairs to be entrusted with the responsibility of law reform or the training of men for such work. In this connection, the following extract from the address of Mr. Elihu Root, President of the American Bar Association in 1916, is pertinent:

> There are indeed two groups of men who consider the interests of the community. They are the teachers in the principal law schools and the judges on the Bench. With loyalty and sincere devotion they defend the public right to effective service; but against them is continually pressing the tendency of the bar and the legislatures, and, in a great degree, of the public, towards an exclusively individual view. . . . The only way to clarify and simplify our law as a whole is to reach the lawyer in the making

8. Professor Joseph H. Beale, Annual Address, 1914, Proc. A. A. L. S., 32, 35, 44.
9. Dean Pound, Annual Address, 1912 Proc., A. A. L. S., 56.
10. Professor W. D. Lewis, 1906, Proceedings, Section of Legal Education of the American Bar Association.
11. Same.
12. Dean. H. F. Stone, Annual Report, Columbia University Law School, 1917.

> and mold his habits of thought by adequate instruction and training so that when he comes to the Bar he will have learned to think not merely in terms of law but in terms of jurisprudence. The living principle of the case system of instruction in our law schools is that the student is required by a truly scientific method of induction to extract the principle from the decision and to continually state and restate for himself a system of law evolved from its history. He is thus preparing not merely to accept formally dogmatic statements of principles but to receive and assimilate and make his own the systematic thought and learning of the world in the science of jurisprudence. With a Bar subjected generally to that process of instruction, the more general systematic study of jurisprudence would follow naturally and inevitably, and the influence of that study would be universal; and from that condition would evolve naturally the systematic restatement of our law, by men equal to the great work.[12]

Much, indeed, can be said in support of the statement that the law teachers as a class are by temperament, training, and status especially fitted for the work of systematizing our law and socializing our legal traditions. Freed from the distractions and strain of active practice and the bias of advocacy in particular cases, they are able to view disinterestedly and critically the entire field of law. The law teacher's ap- and freedom in thought and in constructive endeavors. Through his daily contact with his students in their formative period and through his writings he has an opportunity to exert a tremendous influence, directly and indirectly, in shaping and reforming the law, an influence greatly disproportionate to his numerical pointment and tenure of office make for independence strength in the profession at large.

Those who would lay upon the law teachers the task of law adaptation, improvement and reform do not thereby claim for them any superiority of capacity over the practitioner nor imply any want of fitness in the active members of the bar for such work. It is rather a superiority of opportunity available to the law teachers and a lack of time and inclination on the part of the practitioner. The dominant and absorbing interest of the practicing lawyer is in looking after the welfare of the business entrusted to him. His learning and his experience is devoted primarily to individual clients in particular cases.

That the legal profession as a profession has not fully perceived its social obligations and has not risen to their discharge most lawyers would admit. That they have wholly failed, however, to recognize the public side of their calling is not true. Much of the really sound and workable law reform has come from the disinterested and able efforts of lawyers. Some ardent social reformers are apt to consider the lawyers' refusal to approve of particular reforms as due to selfishness or lack of social interest. They fail to note that very often the refusal is based upon a conviction born of long experience with human affairs that the proposal is unsound. But the lawyer should recognize that the nature of his calling as an advocate tends to obscure his view of the law as a whole and of its social end. A long and successful practice develops an attitude of mind which is essentially individualistic. The individualism of the law is nowhere more conspicuous than in the controversial method of asserting and defining rights. It makes the lawyer a partisan.

This attitude of mind thus acquired results also in a certain theory of legal education. The insistence upon this theory tends to produce a type of law school so excessively utilitarian and practical as to be unable to contribute to the larger social work of the profession. Advocacy being to such a mind the chief function of the lawyer, the chief function of the law school should be to train advocates. Further, the best qualified to train advocates are advocates themselves. One would not for a moment belittle the importance of advocacy or of the practical, but the emphasis of advocacy as the chief function of the lawyer and the training of advocates as the chief function of the law school takes account too much of the individualistic theory of justice, obscures the social ends of law and the social obligations of the legal profession, produces a vocational or trade ideal for lawyers and for law schools, and holds in low esteem the school of jurisprudence and the work of the theoretical jurist.

Assuming that the foregoing criticisms of legal education have substance and that the law schools, as well as the legal profession, are responsible for the situation, how shall those interested in the cause of legal education liberalize the alleged traditional law teachings, meet the social obligations of law reform, and turn out lawyers "trained to think not merely in terms of law, but in terms of jurisprudence?"

Three suggestions are offered as tending to meet the situation: First, as regards those law schools which are connected with a university — and most of the principal law schools are so connected—there should be a thorough integration of the law course with the other courses of the university, and particularly with the courses in the allied fields of history, philosophy, political science, economics, and sociology. Such an integration would have a liberalizing influence on both student and teacher of law and would enable the student, either as a part of his preliminary education (which should include at least two years of college work) or while pursuing his law course, to take subjects in this enlarged field of the social sciences. Law should be recognized as one of the great social sciences, and should be studied in close association with the other social sciences.

Second, law teachers, judges, and leading members of the bar should be united in an effective organization for critical study and constructive endeavor in the fundamental problems of law and its administration. A law institute with such a personnel, meeting annually for a considerable period and working through ad interim committees could become a potent instrumentality in law reform and law improvement.

Third, there should be a close connection with and a participation in the activities of those agencies concerned with legislative law making. The imperative element in the law has been too long ignored by lawyers, judges, and law teachers, or, if not ignored, it has been treated with indifference. The time has come when in our law teaching and in the law curriculum serious consideration must be given to the great and constantly increasing body of statutory law. That our common law principles and traditions are to a rapidly increasing extent undergoing changes by direct legislation is undeniable. However much we may deplore the great mass of ill-digested statute law which comes annually from our legislative bodies, the process will continue. We can either stand by and watch it, criticize or ignore the results after they are reached, or we can join actively with those agencies seeking to improve such legislation and thus make a helpful constructive contribution. Leadership in the legislative development of the law should be in the hands of the legal profession as being the group best fitted by training and experience.

12. 1916, American Bar Association Reports 360-366.

"THE LIFE OF JOHN MARSHALL"

Review of Hon. Albert J. Beveridge's Notable Work on the Career and National Significance of the Great Chief Justice*

By Andrew C. McLaughlin
Professor of History, University of Chicago

FOR several reasons these four substantial volumes are likely to hold a high place among the writings on American history and biography. They are the result of extensive, as well as rather minute, research, resulting in the gathering of some new source material, and in the sifting and sorting of older evidence. They are entertainingly written and by their style and vigor hold the attentive interest of the intelligent reader. They have for their main character in a great drama—the making and establishment of a nation—a man of marked ability and of noble nature holding a position of peculiar influence, a position which was strengthened and lifted to its height because of the sagacity and energy with which he unfolded its powers. Moreover, wisely or unwisely, the author has not by any means confined his attention to biographical details or the immediate experiences of his hero—for as a hero he treats him—but has written at considerable length of the political history of the times, fifty years and more in the history of the American nation. The book is written by a lawyer who has had experience in practical politics, and, while it lacks the balance and the cautious deliberation of work from the workshop of the academic and scientifically cautious student, it possesses a vitality that the more circumspect author would possibly not be able to give to the carefully inspected product of his pen.

These words are on the whole words of high commendation and, in the reviewer's judgment, are deserved. But the task remains of pointing out failings and inadequacies, for some there appear to be. One may justly say "appear to be," because there will almost surely be differences of judgment, concerning whether a method of treatment is inadequate or injudicious. In the first place, much as one approves of continuous contact with testimony, one is justified in questioning the lavish use, if it be lavish, of quotations in the main body of the text. Does the reader get the plain story, the real course of events and their influences, as justly as he would if the testimony had been passed deliberately through the mind of the author and made into the thoroughly articulated or rather vital whole by the creative processes of the mind? Most readers will probably answer the above query in the affirmative and approve of the countless quotations on the ground that they tell their story immediately and not through the mediation of the author's judgment, analysis and synthesis. Most readers may be right. But the selection and insertion of quotations are the result of the author's own purpose; there is no use in thinking that one escapes from an author and sees the actual facts or reads the whole of the original testimony. One is entitled to question at the very least whether such a method is the high-water mark of historical construction, in other words, of the historical art.

While the book discusses political affairs at considerable length, and often, for reasons not evident, narrates in detail many things not intimately associated with Marshall's life, anyone familiar with the ground covered realizes that the result is not a balanced history of the decades under review, though the unwary may think it is. Possibly all biography has this defect of its inevitable qualities; but a biography, that so widely departs from mere biography, encounters its special dangers.

The most serious criticism to be brought against the volumes is that they are in some respects essentially partisan. Once more we find a treatment written from the point of view of the Federalists, and there is nothing new in that attitude or method of approach. Though the author is not totally unaware, it seems, of the underlying social history, and possibly not unaware of the real nature of American social and political developments, we are not furnished a calm portrayal of the great forces of the time, and above all, we are not led by sympathetic and intelligent means to see those forces of social and political development which made the America of the 19th Century. To the historian it should make no essential difference whether he approves of a line of social advance and struggle or not; he has to try to tell what was done; and though few of us can ever succeed in reaching complete detachment and perhaps ought in some cases to have distinct opinions as to what was at a given time wise or dangerous, an effort must be made to present both sides with absolute fairness.

At the present time we value highly the work of the men who made this nation, gave it constitutional form, instilled the spirit of union, preserved and built up the law; and among these men Marshall holds a place of particular eminence and deserves our gratitude and admiration. Without him and men like him, we should not have what we do have in the way of real union and a highly developed constitutional system; and without these things so-called democracy might have failed entirely, and our land been divided into suspicious and unfriendly if not hostile states. But it must always be remembered that there was and is more in the world than mechanical order and obedience; and without Jeffersonism—it may be, without Jefferson—America would not be the land we know. It is a tremendous pity that the fundamental things Jefferson stood for should not be plainly presented, and that he should appear as simply the embodiment of ambition, partisan jealousy and the forces of localism and disintegration. Jefferson, it seems, is to be made the dark background to show off the gleaming worth of Marshall's supreme genius. The historians of the present day in studying the American Revolution have ceased to look on it solely as a war against Britain;

*"The Life of John Marshall," by Albert J. Beveridge. Four volumes, 506, 594, 644, 668 pp. Houghton Mifflin Company, Boston and New York. (Copyright) 1916-1919.

it was far more than that; and if Marshall, as it appears, was permanently and justly influenced by the Revolution to think American salvation depended upon government and union, thousands upon thousands of plain Americans, not quite conscious of any philosophic theory, were intent upon carrying on and forward the opportunities and the spirit of a new-world society. Whether we like the principles of Jeffersonian freedom or like them not, these are the principles which blossomed in America and made America to be, not Europe, but itself. To miss that fact is to miss at the very least half the story, to be blind to the spirit of freedom and hope, the creative spirit of developing liberalism, and democracy. If, I repeat, the author has no belief in the value of these ideals, or thinks them discredited and always dangerous, how can he nevertheless, if he sees them at all, fail to recognize them for what they were, and treat them with respect? There were many things to be done in America besides making a national constitution and holding the union together, wonderfuly appealing as those deeds are to us. America had in addition to find expression for her real self, live out the fundamental purposes of democratic life, make actual, if she could, the philosophy of belief in men and their capacity for self-control, widen and strengthen popular participation in government, make government the actual representative of an uncowed people, believing in themselves.

From the time of Jefferson's entry into public life, from the time that he struggled against intolerance and religious persecution, broke down the established church, swept away primogeniture and entail in Virginia, planned for the abolition of slavery, till the time when he founded the University of Virginia that men's minds might be free,—for a lifetime, in other words, he more than any other one man was the embodiment of the spirit of hopeful, determined, plain democratic America. He represented too the spirit of individualism and believed in freedom from governmental control of men, life and industry, that philosophy which now, by a strange turn of the wheel, is the philosophy of conservatism. Despite his personal failings—and he had them—despite his political blunders or what we call blunders, despite the occasional extravagant statement that a diligent investigator can dig out of his countless letters, he stood and will always stand as the leading personal representative and prophet of American faith and a really new world. When John Marshall and Thomas Jefferson stood together, as the Chief Justice gave to the new President the oath of office, March 4, 1801, they faced a new century that was to carry the doctrines of democracy and constitutional government to the remote corners of the earth; they represented in themselves two tendencies in American life and two forces that were to have tremendous influence; the coming century belonged to both of them; and the wise historian must have at least intellectual appreciation of both if he is to appraise correctly the work of either, certainly if he would know the real America. One reads these volumes, therefore—able, in parts brilliant, captivating —with a sense of sorrow that so much has been done and so much omitted or not comprehended at all. And perhaps one has the more regret because the work comes from one who has lived in the west, who presumably knows the part played by Jeffersonian idealism and philosophy, especially in the up-building of the Mississippi basin through a century of experiment and blunder, of failure and impressive success.

If one must take sides, on which side will one wish to be counted, as he views the struggle in the Virginia Convention of 1829-30? Jefferson was dead, but the ideas he stood for were thoroughly alive. Virginia was at the parting of the ways. Suppose Marshall had come out strongly, as a member of that convention, for freedom, for the right of men rather than property to control government, suppose he had thrown in his lot with the back-country which had been underrepresented for over fifty years; suppose he had enthusiastically helped in the struggle to take Virginia from the hands of the big planters and slave-owners and turn it over to the people of Virginia. Is there any use in speculating as to what might have been the history of Virginia and the Union in the decades that followed? Perhaps the slave-owning interests would still have had their way, though finding the struggle a bitter one. But there might have been a different Virginia; and would there have been a civil war with Richmond the capital of the Confederacy?—all a useless speculation, probably, for such was not Marshall's faith.

Space does not allow a discussion of the author's treatment of Marshall's constitutional decisions. Lawyers will notice an absence of detached and technical criticism, while the historian will have certain additional misgivings. One has a right to expect in a large work like this a serious technical examination. Marshall's greatest decision was Cohens vs. Virginia; in the author's humble opinion, Marshall's decision was sound law and can be heavily buttressed by historical fact and inference. But nevertheless the attack of Roane and the rest on the twenty-fifth section of the Judiciary Act was extremely able; and the reader should not be left with the feeling that it was all ignorance, narrow localism and political jealousy. The greatness of Marshall's decision is not a consequence of Roane's folly and ignorance; quite the reverse. Its greatness arises from the astuteness and large-mindedness with which, having but little purely constitutional law and pronouncement to depend upon, Marshall succeeded in making a generous conception of the nature of the union and its organs of articulation into a legal and seemingly demonstrable fact. And it must be remembered that he did not have even Madison's notes on the convention to assist him.

The author gives considerable space to Marbury vs. Madison and has nothing but admiration for Marshall's position. Mr. Beveridge thinks it a matter of transcendent importance that Marshall should at that time, 1803, have declared a law unconstitutional and thus established the principle. He does not deny that the principle had been stated before. It had been stated cogently and clearly; moreover various acts of state legislatures had been declared unconstitutional by state courts on the ground that they violated the state constitutions. There is nothing new in Marshall's opinion, though it was the first time that the Supreme Court of the United States had exercised this power. It may possibly be argued that Marshall's opinion was more convincingly framed than earlier statements, but such a judgment is at least doubtful. The court did not again declare a national act void for some fifty years, or an important one till about the end of the Civil War, unless Taney's opinion in the Dred Scott

case (1857) can be listed as constituting such a decision. At the most, therefore, there were only two or three cases during about 70 years and more. We are likely to forget that judicial review has had its chiefest influence in state tribunals, and also in the Federal Supreme court in denying validity to state laws violating the Constitution or laws of the United States. Furthermore, Marshall backed into his decision; he discussed at length the merits of the controversy and then declared that the court had no jurisdiction—a most extraordinary procedure. In addition, the need of declaring the thirteenth section of the Judiciary act of 1789 void is, to put it mildly, exceedingly doubtful; for the court would have been more than justified in so construing the section as to refuse jurisdiction and still uphold the act. On what then, are we to base the great admiration for Marshall's stand in Marbury vs. Madison? Not on the ground that he announced a new principle; not, it is to be hoped, because Marshall declared an act void, when he was not called upon to do so; not because he took advantage of his position to upbraid the President and Secretary of State in a case over which the court had no jurisdiction. The only possible reason for admiration, if there is any, is that in this most extraordinary fashion he proclaimed to his opponents the authority of the judiciary; and we are entitled to question both the propriety and the political wisdom of doing so. The Republicans of those days had many reasons for distrusting and more for disliking the Federalist judiciary. Did Marshall's conduct help to allay distrust and really, during those early years, strengthen the judicial branch?

Again, one would like to have space to discuss Marshall's stand in the Burr trial. One can only say here that if Burr is to be held up as a spotless patriot, while Jefferson and Hamilton are to be considered mere mean-minded pursuers of innocence, we shall have to rearrange our ideas considerably, even if we accept Mr. McCaleb's and Mr. Beveridge's interpretation of the conspiracy. Marshall's law may have been good; but a critical examination may lead the trained lawyer to agree with Corwin, (*John Marshall and the Constitution*) that the case is a blemish on Marshall's career.

Extended as this review is, it fails to present adequately either the merits or the failings of these able and disconcerting volumes. The work is not likely to be done again, certainly on no such scale and with no such skill in this generation or the next. One wishes he could say that it is definitive; the author has told the story of the great jurist vividly; but as the volumes portray with considerable fullness the political and constitutional history of the time, one is justified in wishing, that, without surrendering vigor and brilliance, they could likewise have exhibited the wise and judicious temper and the generous appreciative judgment that are the mark of really great historical writing.

Military and Civilian Justice

The military system (of Justice) can say this for itself: it knows what it wants; and it systematically goes in and gets it. Civilian criminal justice does not even know what it wants, much less does it resolutely go in and get anything. Military justice wants discipline—that is, action and obedience to regulations and orders; this being absolutely necessary for prompt, competent, decisive handling of masses of men. The court-martial system supplies the sanction of this discipline. It takes on the features of Justice because it must naturally perform the process of inquiring, in a particular case, what was the regulation or order, and whether it was in fact obeyed, but its object is discipline. The civilian penal system, on the other hand, has not even formulated what it wants. Some still say Retribution to the individual; some say Prevention of other wrongdoers; some say not Retribution but Reformation of the individual; and most ignore the fundamental element, namely, the public reaffirmation of the community's principles of right and wrong.—From address delivered before Maryland Bar Association June 28, 1919, by John Henry Wigmore, printed in February issue of Journal of the American Judicature Society.

Sea Burial Ordered in a Will

A curious will providing for burial at sea without false sorrow was recently proved by the Public Trustee of England. The testator was Miss Margaret Deakin. The will opens: "Being of perfectly sound mind and in full possession of all my faculties," and then goes on to state:

I will that my body shall be put in a lead-lined, plain white wood coffin, and if I die away from Porthpean, be taken to Porthpean and buried in the sea there off the Black Head.

The sea has always been a friend to me. Some of the few happy days I have had in my life have been spent on it, and I will not be buried anywhere else but in the sea. If the two boatmen—the Axfords—are still at Porthpean when I die, I would like them (and I am sure they will do it for me) to take my coffin in one of their boats very early in the morning or late in the evening, when there is no one about on the beach and no other boats in the bay, just in their everyday clothes as they go out and attend to their nets, and bury it in the sea off the Black Head.

Not one member of my family or relatives shall be present, and no funeral service shall be held—I have been tortured enough by cunning hypocrites, and I will have no hypocrisy about my death, only the men necessary to manage the boat (I hope it will be the two Axford men, because I have had most happy days in their boats) and the person who undertakes to look after my burial shall be present.

I have lived alone, intolerably lonely sometimes. I sincerely hope I shall die alone; I do not want any death-bed scene, and I will be buried alone without any relatives or a gaping crowd looking on. The day and time it is to be done must not be known to any but those who are to bury me.

She left £10 to each of the two Axfords if they should carry out her burial as requested.

Miss Deakin's body was found in the sea off Georgeham, and the will was, with other documents, in a small bag fastened by string around her neck. The will was saturated with salt water, but was opened out, and pasted on sheets of Devon Constabulary foolscap, and has been admitted to probate in this form.

JOURNAL

ISSUED BY

AMERICAN BAR ASSOCIATION

BOARD OF EDITORS

EDGAR B. TOLMAN, Editor-in-Chief.....Chicago, Ill.
JOHN LOWELL.....Boston, Mass.
JUDGE GEORGE T. PAGE.....Chicago, Ill.
CHESTER I. LONG.....Wichita, Kas.
HERMAN OLIPHANT, Exchange Editor.....Chicago
R. E. LEE SANER.....Dallas, Texas

Subscription price to individuals, not members of the Association nor of its Section of Comparative Law, $3 a year. To those who are members of the Association (and so of the Section), the price is $1.50, and is included in their annual dues. Price per copy 25 cents.

Office: 1612 First National Bank Bldg., 38 South Dearborn Street, Chicago, Illinois

JUSTICE AND CIVILIZATION

The JOURNAL is fortunate in being able to present an account of the collapse of the Russian judicial institution by one who had unusual opportunities of observation. Judge Fisher went to Russia as chairman of one of the committees charged with the distribution of the American fund for Jewish War Sufferers, in January 1920, and remained there in the work of that committee nearly seven months. His credentials and the nature of his errand brought him into relations with the Soviet authorities, which enabled him to see things at close range.

In this land of ours we have been so accustomed to the rule of law and the supremacy of Justice that we cannot imagine what our state would be if the right of every man to appeal to an impartial and independent tribunal for the protection of his rights and for the redress of his wrongs were to be taken away. The soviet authorities do not pretend that Russia is now under the rule of justice. They frankly admit that force has superseded justice and they plead in extenuation the existence of a state of class war, which necessitates as a war measure the suspension of individual rights.

Russia is giving the world many object lessons. Nearly all of these object lessons exhibit the fatal consequences of departing from the fundamental principles upon which the structure of civilization rests. Unless the supremacy of justice be established as a rule of social conduct and unless judicial tribunals are available to administer prompt and impartial justice, there is no possibility of the peace and order essential to the life of every social organism. If injustice cannot be prevented or redressed by the tribunals, it will in time inevitably be opposed by all the force of those who suffer beyond the limits of patient endurance.

There are none but a misguided and negligible few who propose to abolish our judicial institutions, but there are more than a negligible few who propose to gain control of them by stealth, for selfish and sinister purposes. Such attacks are more insidious and dangerous than the direct attacks of blatant anarchists, for they are more likely to succeed, and so far as they do succeed they destroy the judicial institution. A court that is not absolutely free of all domination cannot exercise the true judicial function. It becomes an instrument of injustice. Better by far the abolition of courts than their surrender to private or political control. There can be no civilization without justice and no justice without judges free from every other control than that of law and conscience.

THE RENT REGULATION CASES

The Supreme Court has sustained the rent regulation statutes of New York and the act of Congress for the District of Columbia by a vote of five to four. Doubtless every reasonable effort was made to compose differences in the conference room, but the earnestness with which opposing views are stated in the prevailing and dissenting opinions shows that discussion here probably had no reconciling effect.

The members of that high tribunal did not differ as to the law, their controversy was wholly as to the application of the law. This controversy had a substantial relation to the views which the particular judge entertained as to the effect of the decision, as a precedent. Indeed the judges seem to have ranged themselves on either side of a line which separated those who feared that the decision would prove to be a dangerous one in the future, from those who entertained no such fears but who regarded the legislation under consideration as a justifiable exercise, during the existence of an emergency, of the sovereign right of society to protect itself from evil consequences which could not be remedied save by the exercise of the police power. The self-contained time limitations of the acts, the fact that the statutes were invoked merely to preserve temporarily an existing status and that its provisions could be invoked only against those who sought to enhance the price demanded for shelter, in a time when all other prices were falling,

may explain the apparent lack of protest against the decision, for of public outcry there is little evidence.

A MODEL COURT ROOM

A distinguished Federal Judge recently suggested as a practical question for discussion, which he thought might yield valuable returns, "an ideally arranged court room," with particular consideration of its acoustics.

Court rooms are notoriously badly ventilated, insufficiently lighted, inelastic as to capacity, inconvenient and uncomfortable for those who are compelled to spend time within their doors; but perhaps less attention than to other details has been given to such an arrangement of the witness stand, the jury box, the judge's bench and the counsel's table as would make it possible for all of these different actors and functionaries to play their respective speaking and listening parts most effectively and with the minimum of nerve strain. Where ought the witness to sit or stand? Should he be between the judge's bench and the jurors' box and if so, which way should he face? How can he be placed so that court, jury and both counsel can be in direct line of his usually untrained vocal output and with equal opportunity of that privilege or duty which is of equal importance to all of them—to hear what he says and to see his face when he says it? Sometimes a judge puts thirteen chairs in the jury box and occupies one of them himself, but in such case the interrogating lawyer must place himself on the far flank of the jury box if he is to scrutinize the countenance of the witness—a process more vitally important to the cross-examination perhaps than to the examiner-in-chief. How shall we place these two contenders so that neither of them shall have advantage over the other?

Perhaps it would not be a waste of money even in these times of financial stringency for the American Bar Association to invite competition of design for a model court room and to contribute an honorarium for the successful competitor adequate to secure the participation of the best talent in the profession of architecture. The approved designs should, of course, be made available through the state and local bar association to the county authorities wherever new court houses are being built or old court rooms remodeled.

BINDING AND INDEX

A number of inquiries have been received from libraries and others as to the method to be employed in binding Volume VI of the Journal, in view of the change of size beginning with the September issue of last year.

There are two methods which are entirely familiar to book binders and work very satisfactorily. One is to bring the backs and tops of the smaller and larger numbers together and bind with a cover the size of the larger numbers. This leaves the smaller issues "on stilts," as the book binders put it.

The other is to bind the volume in two parts. The smaller issues of the old Quarterly will then be Part I and the issues of the Journal in its present enlarged form, up to and including that for December, 1920, will be Part II. This is a more expensive way.

The index to Volume VI will, of course, be placed immediately after the December issue, whichever method of binding is adopted. It is so arranged that the references to the Quarterly and the Journal in its new form are clearly distinguishable.

With this issue, we are sending the index to each member. Even those who do not wish to bind the volume will find the index worth preserving in its detached form.

DELAY AND COMPENSATION

Difficulties in the printing business between employers and employes are responsible for a delay of about a week in issuing the Journal for May. We trust that compensation may be found by members in the fact that this issue is printed on a heavier grade of paper than we have heretofore been using. When the Journal began publication the high price and scarcity of paper rendered it advisable to use the stock heretofore employed. The gradual reduction, however, in the price of this particular commodity enables the Board to make a change which it trusts will considerably improve the physical appearance of the magazine.

CONTRIBUTIONS

This board of editors wish the members of the Association to feel that the Journal is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

Articles cannot always be published in the number following their acceptance. Those who send them, however, may rest assured that material which is found available will appear at the earliest possible date.

ESSENTIALS OF A PUBLIC PERSONNEL POLICY

Changes Demanded in Conformity With the Scientific Concept of Public Administration Now Making Its Way to Acceptance

By Leonard D. White
Associate Professor of Political Science, University of Chicago

THE rapid emergence of the employment manager in private industry and the development under his leadership of a techinque of personnel management have served to throw into clear relief the unsatisfactory condition of public employees in many branches of the administrative service of the United States, federal, state, and local. The advanced conception of the position and function of the civil service which is just finding its way to legal expression in England and on the continent emphasizes the relatively slow progress which has been made in this country in securing the fundamentals of a permanently sound employment policy for the administrative services.

Such an employment policy is the basis of efficient administration. Reorganization of the central administrative offices with the purpose of subordinating them to a common superior, centralization of power in the hands of state officials as against county and local authorities are necessary steps for the rehabilitation of the state executive; but a highly integrated and centralized administrative system will not produce the proper results unless the energetic and enthusiastic cooperation of the civil servants can in some manner be allied with the various governmental agencies. For confirmation of this position, it is sufficient to turn to the recent report of the Congressional Joint Commission on Reclassification of Salaries, which summed up the present condition of the federal service in the following words:

> That there is serious discontent accompanied by an excessive turnover and loss among the best trained and most efficient employees, that the morale of personnel has been impaired, that the national service has become unattractive to a desirable type of technical employee, and that the government has put itself in the position of wasting funds on the one hand and doing serious injustice to individuals on the other. . . . (1)

It is probably true that the conditions of the federal service are not inferior to those found elsewhere; indeed it is generally taken for granted that on the whole greatest progress toward a solution of the personnel problem has been made by the federal government.

Three concepts of the civil service have been held in the course of American history. The first, dominant from the founding of the government to the administration of Andrew Jackson, may be called the bureaucratic concept. Tenure of office was practically permanent, a high degree of technical attainment, so far as the service then demanded, was maintained, appointments were made largely on the basis of capacity for the work, and the civil service of the federal government offered a real career to able men. The second period was dominated by the spoils concept of public office, and was imported into the federal service from New York during the administration of Andrew Jackson. It should be said in all fairness to Jackson that he was really alarmed at what he thought were the un-American and un-democratic implications of the prevailing bureaucracy; and the overthrow of "King Caucus" and the permanent civil service may well have been linked in his mind as the two essentials of a real American democracy. At any rate the destruction of the idea of a non-political permanent body of officials was complete; the four year rule was extended, office was thrown open to the ordinary citizen, partisan allegiance rather than technical capacity became the essential qualification of the office-holder, and the possibility of finding a career in the public service, other than as a party worker, disappeared.

The power which the party organization thus acquired in prostituting public office to partisan purposes was so enormous that the Whigs were unable to resist the temptation to make due use of their later opportunities, and spoils politics settled into an accepted American tradition, a tradition which it must be admitted still possesses great vitality and resilience.

Something has nevertheless been done to establish a third and more promising ideal of the public service. The assassination of President Garfield by a disappointed office seeker crystallized an insistent demand for the reduction of the spoils system and Congress in response passed in 1883 the well known Pendleton Act, which still serves as the basis of the merit system in the United States. Some of the states and many cities have followed this example but on the whole the progress of the merit system of appointments has been slow, and the mal-administration of those laws which have found their way to the statute book has been persistent and adroit. We may nevertheless assert that a new concept of the civil service is struggling its way to acceptance, best called the scientific concept of public administration. It recognizes in the modern administrative agencies a highly technical service, calling for the finest equipment and ability, a service which has no relation to the shifting tides of political opinion and which demands on behalf of the common weal to be freed from the incubus of partisan domination.

What then are the elements of a sound personnel policy for such a public service? How can a scientific concept be guarded and secured? How can the morale of the civil service be restored and maintained at a vigorous level? A complete answer to this question involves consideration of a wide variety of influences bearing on the administrative departments and in the course of this article only some of the most important can be mentioned. The first essential of a permanent employment policy is complete security against removals for political, religious, or personal reasons. It ought not to be necessary after nearly forty years experience with the merit system to insist on this point, but it is unfortunately true that the scientific as op-

(1) House Document 686, 66th Congress, 2d session, p. 19. March 19, 1920.

posed to the spoils concept of public administration has not yet firmly established itself. It is not even necessary always to await a change of party to bring about a political proscription; a mere change of administration bringing into power a new faction will sometimes prove sufficient to unleash an attack on all pregnable positions. It is perfectly obvious that where office is filled with the confident expectation that the tenure thereof remains contingent upon the continued political dominance of a given party or a given faction within a party, that men possessing high technical qualifications will not be persuaded to enter the public service; that those who do enter the service will do so largely because there they find their reward for past political activity; that, being vitally interested in the possession of their position, they will be tempted to engage in the partisan manipulation which will ensure the future success of their group, and finally, that the concept of the public service as a career in which faithful service to the state is rewarded by the honorable prestige of position can gain no recognition. We need in America the introduction of the reign of law in the personnel policy of the government.

Signs multiply that the reign of law may soon illuminate the political horizon. The idea of a joint council representing in equal numbers the employees of the state and the directing administrative officials, with powers of investigation and recommendation, has already taken root in England; and to avoid a repetition of the London police strike an elaborate and official Police Union has been established to cooperate with the police authorities. A bill providing for review by councils on which employees find representation of cases of discipline and removal in the French civil service, but reserving ultimate authority in the hands of superior officers, has been recently presented to the French Chambers. The Joint Congressional Committee, to which reference has been made, suggest the establishment in the United States of an Advisory Council to the Civil Service Commission, which should be composed of six representatives each of the administrative staff and of the employees of the three main groups of services: manual, clerical and professional.

The long established Illinois rule (recently modified for the state civil service) requiring an authoritative review of removals by superior officers, probably goes too far in the direction of protecting employees, and illustrates the difficulty of fixing the point on which may be supported a fair equilibrium between the legitimate demands of the service and the necessary authority of the responsible directing officials. There must be adequate and instant means of removing incompetent, insubordinate, and morally irresponsible members of the civil service. In so far as possible objective standards should be set up to be followed by superior officers in the exercise of this authority, as for instance effiiency records to determine competency. At best however it is difficult to see how the doors can be closed entirely to abuse of such necessary authority merely by formal requirements. The latter should be drawn however as carefully as possible, and forthcoming experience with the European Joint Councils may prove extremely suggestive; but at the moment, what is most needed in the United States is an effective public opinion which would condemn in absolutely certain terms unsupported and unjustifiable removals (as for alleged incompetency) in order to provide a fruitful vacancy for a political supporter. That is to say, the crying need of the moment is not a better law, but a real observance of the existing law.

Another important element in a sound personnel policy is a system of instruction for candidates for the public service. Until the possibility of a real career in the public service is opened to young men and women by the assurance of a non-political tenure, it will be idle to go far in the direction of providing a technical equipment for them. With the coming of a new concept of public administration, however, it will be at once necessary to make more adequate provision for proper training for civil servants. France and Germany have already indicated what can be done in this respect. Although considerable reliance is placed in both of these countries on university training, still the state undertakes the training of certain specialized branches itself. Thus in France there is the well known Ecole Nationale des Ponts et Chaussées, a training school maintained by the state to furnish the technical equipment of the engineers who have charge of the construction of roads, canals, bridges, and other public works. In Germany the candidate for the important administrative positions, after completing his university education, works for two years with one of the higher courts and then for two years with some administrative authority, at the conclusion of which he undergoes the great state examination. In England the upper grades of the permanent service are filled almost entirely by university graduates, although specific training for administrative work is not a prominent part of their training. These illustrations suggest that American universities may have a larger part to play in the training of men for administrative careers than has yet been the case. But the universities have other tasks than this, and it can hardly be supposed that their contribution will be wholly adequate, especially in preparing for the more highly specialized positions. The governments, federal and state, would reap a high return on the investment needed to establish training schools, in which instruction could be given in the organization of the administrative departments, the function of a civil servant, and the specific duties of a given group. The training school of the Bureau of War Risk Insurance, established in 1918 to do something in the way of preparing the horde of new employees for their work, illustrates the possibilities of such an institution. For some time to come the major work of such schools would probably consist in the special and immediate preparation for the technical work of some department, but its ultimate usefulness would be certain to expand beyond these modest limits.

The morale of the civil service would be immensely improved by the simple expedient of extending the merit system to include many of the higher positions of directing authority, and at the same time permitting more freely transfers from one department or bureau to similar work in another. The beneficial results of this reform would be very great. At the present time, it frequently happens that civil service employees are caught in blind alley employment whose possibilities are quickly exhausted and from which there is no easy escape. The initiative and aggressiveness of the civil servant are soon sapped where there is no prospect of promotion, and his contribution to the public work becomes a matter of routine drudgery. Give this same man the opportunity to transfer by passing successfully a competitive examination to another related field of work and a permanent incentive is before him to climb the administrative ladder to

positions of greater responsibility and remuneration. The federal service has recently been studied with this problem in mind and proposals are pending before Congress to reclassify and standardize the service in order to assure, in addition to equal pay for equal work, a clearly organized line of promotion from less important to more responsible positions and thus to end blind alley employment. If the service were thus organized an intelligent personnel agency could easily eliminate the dead wood in its organization and retain a vigorous competitive system which would tone up the whole service.

Until the civil servant can be assured of some positions worth striving for, the advantages of a proper classification will be in part nullified. Under the Illinois Civil Code, the directors, assistant directors, and division heads, with salaries running down to $3,000, are removed from the merit system. In the United States the line is drawn at division chiefs. Thus the directing personnel is not open to those who enter the civil service in the lower grades, and their avenue of promotion comes to an abrupt termination at exactly the point where high grade responsible work is to be done. The result is extremely unfortunate; the abler men in the service, when they reach the highest positions open to them and by accumulated experience become unusually valuable to the government, are drained off by attractive offers from private employers; the less able rise by slow degrees from post to post and never give to the service the finest type of work, although frequently faithful and competent employees. Some means should be found to retain in the government employ the aggressive and able men who at some time in their career find a place in the civil service; but unless they can be assured of rewards commensurate with their ability, in short unless they know they can advance to responsible positions if their abilities mark them for such success, they will speedily desert the public for private employment—and do.

A carefully prepared retirement allowance is equally important in a sound personnel plan. As a reward earned by long and underpaid service, a pension plan has little to recommend it; as a means for permitting and indeed requiring the elimination of the aged and under-efficient employee, it rests on an impregnable foundation. A retirement plan on a sound actuarial basis, whether contributory or non-contributory, has been recognized for over a decade by all students of the matter as an urgent necessity. In response to this situation, the last Congress made provision by which individual allowances up to $720 a year are made to employees retiring normally at age 70.[1] A wide variety of pension plans in states and cities indicates that this phase of personnel management is receiving general attention.

The proper administration of the various phases of a personnel policy requires a personnel agency. No public authority has yet developed in the United States a central directing personnel agency equipped with the necessary staff and endowed with adequate authority. The various Civil Service Commissions are the nearest approach to such an agency; but commonly their function is limited to the single duty of preparing and grading examination papers for appointments or promotions. The proper training of the recruit, his adjustment to the administrative machine, the supervision of his work by efficiency records, the administration of a retirement fund, the adjustment of grievances, the review of matters of discipline, all this and more falls into the purview of an active employment manager. There is no reason to doubt that the specialization of this function in a separate agency of the public service would result in a clearer realization of the possibilities of employment technique and a progressive attainment thereof.

It may seem to readers of the preceding paragraphs that too little insistence has been laid on ways and means of ensuring a high standard of work. Security of tenure, better training at public expense, opportunity for promotion to the higher ranks, a retirement allowance, a more highly developed personnel agency may appear at first to be making even easier an employment which is already looked on in some quarters as unduly favored. As a matter of fact, these elements of a personnel policy are deliberately selected as having a vital bearing on the attainment of the highest quality and quantity of individual service. A dissatisfied mass of employees, smarting under real or fancied grievances, will not fail to find means of wrecking any attempt to extract from them the high grade work which should be given. A mass of employees fairly treated and provided with an outlet for the expression of their grievances will respond to the demand for high grade work which should certainly be required of them. The administrative machine should be so organized that weak points in the staff or in the line should automatically appear; and authority should be clearly lodged to cause the removal of those responsible for the weak links in the machine. An integrated and properly coordinated overhead organization coupled with an intelligent and generous personnel policy free from the blighting effect of partisanship should result in an administrative service the equal of those maintained by private corporations. The development of public enterprise awaits the coming of such a service.

(1) Act of May 22, 1920.

Personal

Hon. Leslie P. Snow, member of the New Hampshire Council of the American Bar Association and formerly President of the New Hampshire State Bar Association, was recently appointed Justice of the Supreme Court of his state by Governor Brown, to fill the vacancy caused by the retirement of Judge Reuben E. Walker. At the time of his appointment Judge Snow was serving as President of the Senate, the office carrying with it the Lieutenant-Governorship of the State.

Judge Snow was educated at Dartmouth College and took the law course at Columbian Law School, now the George Washington University. He was admitted to practice law in Maryland in 1890 and the following year was admitted in New Hampshire, where he practiced for twenty-nine years, until his appointment to the Bench.

He has had much business, as well as legal experience, and at the time of his appointment to the Bench was President of one of the largest banking institutions in Eastern New Hampshire.

Minority Domination

Minority domination succeeds at the outset by attacking its foes in detail. The man who does not interest himself as long as his personal privileges are not threatened will find himself with few allies when the hosts of "verboten" get around to him.—Law Notes (March, 1921).

CURRENT LEGAL LITERATURE

IN the April number of the *American Journal of International Law* there is an extended discussion of *the administration of justice in the Swiss Federal Court in international disputes* by Dr. Dietrich Schinder of Zurich.

Richard W. Flourney, Jr., Assistant Solicitor, Department of State, begins in the April issue of the Yale Law Journal a discussion of *the problems of dual nationality*. He undertakes to consider the law of nationality of the principal countries of the world and to set out the legislative and executive efforts to settle the questions of dual nationality.

A very full description of *the French system of military law* has been prepared for the Illinois Law Review (April) by Ernest Angell of New York City.

To what extent the theory of *the corporate entity* is, under the cases, and should be for sound reasons, a practical limitation upon the taxing power of Congress are questions considered by Arthur A. Ballantine of New York City in the Harvard Law Review (April).

General interest will attach to a study by J. Whitla Stinson of New York City which to be found in the American Law Review (March-April). The subject is *the theory of war risk in French, English and American law.*

Eustace Seligman of New York City discusses *the implications and effects of the Stock Dividend Decision* in the Columbia Law Review for April. This is a close examination of the accounting principles upon which the Decision rests. Here, too, is a full and careful collection of the current learning upon this subject.

Ernest Freund's paper on *the right to a judicial review in rate controversies,* in which Ohio Valley Water Co. v. Ben Aron Burough, 40 Sup. Ct. 527, is criticized and which was read at the meeting of the Association of American Law Schools in December, 1920, is reprinted in the March issue of the West Virginia Law Quarterly.

What is necessary under the Illinois cases to raise a *question as to the constitutionality of a statute* is considered by Walter F. Dodd in the April issue of the Illinois Law Bulletin.

Walls v. Midland Carbon Co., 41 Sup. Ct. 118, held constitutional a Wyoming statute regulating the use of gas. Thomas W. Shelton of Norfolk, Va., makes an unfavorable review of this decision the subject of an article headed *Police Power versus Property Rights* in the Virginia Law Review (March).

One of a number of current discussions of *the extent of the police power in the field of rent regulation* is that by Alan W. Boyd, a law student in the University of Michigan. It appears in the April issue of the Michigan Law Review. That it is printed as a leading article is no excess of indication of its merit as a piece of good workmanship.

Those collecting material on the movement for *judicial settlement of industrial disputes* will want to make a reference to a discussion of an industrial court bill proposed for Iowa, which discussion is by John T. Clarkson of Albia, Iowa, and is in the Iowa Law Bulletin for March.

In Law Notes (April) is a discussion of the question, whether *the failure of a sheriff to execute a sentence of death* on the day named in the death warrant entitles the prisoner to freedom. From an examination of the authorities, it is concluded that it does not and it is pointed out that a contrary rule would vest too much power in the hands of the sheriff.

Beginning in the issue of the Central Law Journal for April 1 is a series of important studies in *the law relating to infants.* In the first four instalments are treated the custody and domicile of an infant. Apart from its merit in stating the result of the cases, this discussion is noteworthy as an avowed attempt functionally to consider the problems involved. Attention was called to like work by this author, Albert Levitt of Washington, D. C., in the February issue of the Journal issued by the American Bar Association.

The ancient rule of "right and wrong" as *the test of criminality as to acts of insane persons* and modern adherence to it are vigorously critized by John C. McWhorter, formerly Judge of the Twelfth Judicial Circuit of West Virginia, in the March number of the West Virginia Law Quarterly.

All of the English, and much of the American, material relating to *the tort liability of those mentally deficient* is collected and examined by W. G. H. Cook, Middle Temple, London, in the April number of the Columbia Law Review.

More than a lively curiosity should lead one to examine *Psychic Phenomena and the Law,* by Blewett Lee of New York City, Harvard Law Review (April). Herein is not a little light on general questions as to legal capacity and invalidating influence.

Percy Bordwell of the State University of Iowa has begun in the April issue of the Harvard Law Review an examination of the authorities relating to *seisin and disseisin.*

Those who are following the movement to reform English land law will be interested in "Why Not Restate *the English Law of Ownership of Land?*" by James E. Hogg of Sidney, Australia, and "Lord Birkenhead's Proposed Changes in the Law of Interstate Succession in England," by Charles P. Sanger, Lincoln's Inn. Both of these articles are to be found in the April issue of the Yale Law Journal.

There is an elaborate review of recent Illinois *cases on contingent remainders* in the Illinois Law Review for April.

The address by Henry W. Taft of the New York Bar delivered January 13, 1921 at a meeting of the Association of the Bar of the City of New York has been printed in the Yale Law Journal (April). The subject of this address is "Comments on *Will Contests in New York.*"

A study of a kind so far rarely met with in legal periodicals but likely to be seen with increasing frequency is George G. Bogert's article on *problems in aviation law* (Cornell Law Quarterly, March). As a general survey this discussion should prove useful when impending legislation comes to be considered.

William W. Cook of New York City concludes an article in the Michigan Law Review (April) on *Watered Stock,* Commissions, Blue Sky Laws and Stock Without Par Value, in which he discusses the last three as remedies for the evils of the first, as follows:

> It will be seen that the whole subject is still in the melting pot. So far the speculation proclivities of the Anglo-Saxon race have outmaneuvered the law.

Of general interest and of more than average merit is a discussion of the law and the regulative practices as to *corporations with shares having no par*

value. This study is to be found in the February issue of the University of Illinois Law Bulletin. The authors, Albert J. Harno and Raymond T. Rice, have made an important contribution to the learning upon this new subject, which is of increasing importance.

The history of our struggle to preserve competition as an adequate regulative device in the control of commerce and industry so as to avoid so far as possible governmental regulations is interestingly and informingly traced by Hon. Henry J. Steele, M. C., in the March issue of the Cornell Law Quarterly under the title, *the Sherman Anti-Trust Law; Its Past and Future.*

The more recent developments of the law as to *unfair competition* are set out by Amasa C. Paul, of Minneapolis, in the April issue of the St. Louis Law Review.

That troubled area in the law of contracts labeled *"illusory promises"* has been re-examined by Edwin W. Patterson in the Iowa Law Bulletin (March.)

An interesting and useful discussion of *the power of one guilty of a breach of contract to recover the value of his own performance* by way of restitution is the article by Henry W. Ballantine in the April issue of the Minnesota Law Review.

Is it a prerequisite to the recovery in a suit in equity of both the defendant's profits and the plaintiff's damages that the owner of a patent mark the patented article "patented" or give notice of infringement as is clearly required by U. S. Revised Statutes, Section 4900, in actions at law for damages for infringement? *The Marking of Patented Articles* Everitt N. Curtis, New York City, Columbia Law Review (April).

Kenneth C. Sears has made a discussion of a decision on larceny of referendum petitions the occasion for a careful consideration of almost the whole area of law regulating to *larceny of documents.* University of Missouri Bulletin, Law Series 21, March.

A bank owns a note, the maker of which is one of its depositors. After the maturity of this note the maker checks out all of his deposit. Does *the bank's failure to apply the maker's deposit in payment of the note* release an accommodation indorser? Central Law Journal, April 29, article by James M. Kerr of Pasadena, California.

The first instalment of Ernest G. Lorenzen's manuscript on questions relating to the law governing *the validity and effect of contracts in the field of conflicts of law* appears in the April issue of the Yale Law Journal. His discussion is of fundamental principles rather than of detailed applications. As he is well equipt to do, the author draws liberally from foreign sources for material bearing upon his subject.

A valuable study of the doctrine of Lumley v. Wagner has been made by Robert S. Stevens of Cornell and is printed in the Cornell Law Quarterly for March under the title, *Involuntary Servitude by Injunction.*

The evils of judicial departure from precedent are pointed out in a picturesque style by H. W. Humble of the University of Kansas in the Michigan Law Review (April). The occasion for this discussion is the decision of the Supreme Court of Kansas (Thurston v. Fritz, 91 Kas. 468) holding *dying declarations admissible in civil as well as in criminal cases.*

Under a statute of Massachusetts constituting procedure for small claims, there has been drafted by a committee of justices a set of *rules for small claims procedure.* Both the act and the rules are printed in the Journal of the American Judicature Society (April).

In the same journal is an account of the efforts of the Chicago Chamber of Commerce in behalf of *commercial arbitration.* The decision of the Illinois Supreme Court holding constitutional the revised arbitration law which takes away the power as well as the privilege to revoke an agreement to submit an existing controversy to arbitration has had the effect of redoubling the Association's efforts to popularize commercial arbitration.

Excluding actions involving title or possession of real estate and provisional or remedial actions such as receiverships and attachment, no court in North Dakota has power to issue process in any action involving $200 or less until shown that an attempt has been made to obtain a settlement at a conciliation hearing and has failed. So provides the *North Dakota Conciliation Act.* Within 90 days from March 10 the District Court judges are to choose conciliators to represent them in every county in the state. This experiment covering so wide an area will be watched with great interest. A further account of it is to be found in the Journal of the American Judicature Society (April).

F. Dumont Smith of Hutchinson, Kansas, has raised the question *whether reformed procedure has tended to break down the doctrines of equity* by their being overridden by the conflicting rules of law? He points out that Pomeroy said this would happen but states that such has not been the case in Kansas. He urges the extension of reformed procedure to the federal courts if it be found that equity principles are not being broken down. Central Law Journal, April 8.

A complete summary of the *Government of Ireland Act* of 1920, sent out by the Chief Secretary for Ireland, is reprinted in the Canadian Law Journal (March).

Books which lawyers and judges have written about themselves and about their profession are listed and reviewed by Fred H. Peterson (Canadian Law Times, April) in a most interesting fashion.

A look into the old books that reveals much quaint and interesting information is *A Court Seven Hundred Years Ago.* The author is William R. Riddell of Toronto, Canada, American Law Review (March-April).

Those who are critically reading "The Life of John Marshall" by Albert J. Beveridge will be interested in an article by Nathan Isaacs entitled *John Marshall on Contracts* and appearing in the March issue of the Virginia Law Review. This is an able study and shows

> * * * that, in estimating the work of a great judge or a small one, it is not enough to study his personal biography and the political facts of his day, important as these considerations are. We must go also into the juristic notions of the time, the "popular jurisprudence" which, consciously or unconsciously, for better or for worse, exerts its subtle influence, even through the most practical of men, on the development of the law.

Under the heading, *Does the Constitution Protect Freedom of Speech?* Herbert F. Goodrich expresses views in the Michigan Law Review (March) which are much more tolerant of the way in which we handled limitations on freedom of speech during the war than are the views commonly found in current discussions of this subject.

CURRENT DISCUSSIONS OF LEGAL METHODOLOGY

Comments Bearing on the Ever Present Problem of Making the Law "An Expression of Developing Ideas of Right"

AMONG persons having the time and inclination to reflect upon such things, there is an opinion, more and more nearly approaching unanimity, to the effect that many of those features of our law which are considered by current thought to be defects of a serious sort represent a hang-over in legal theory from a period when the conditions of life made fostering individual interests, with little regard to social interests, a desirable end into a period when the conditions of life have so changed as to result in a reversal of the group judgment as to what the desirable ends are, with a resulting demand of increasing insistence that social interests shall be fostered although that involves invading the sphere of the individual's privileges and powers hitherto considered of inviolable sanctity. This is, of course, but one of numerous divergences of law and public opinion but it is the most important as well as the most apparent one. Doubtless not all of those who recognize the existence of this basic shift in social value-judgment consider this change desirable. It may or it may not be. This, however, is a question which we may be justified in passing over for any or all of the following reasons as one may prefer. (I) Fundamental questions as to ultimate social values lie outside the field of the lawyer as such. His work, rather, is to accept such value-judgments as have been made by other agencies whose business is their making and to set up and operate the legal devices or structures best designed to carry out such judgments with the minimum of social friction and best adapted to realize the maximum of each of the conflicting social interests involved in such judgments. (II) Whatever one may think of the ultimate wisdom of a given policy (social value-judgment), one may recognize the privilege of each period to cultivate the interests which it thinks desirable by casting its life into such grooves of social control as it prefers. (III) The drift represented in current judgments of what is socially desirable is not primarily a cause but an effect of a multitude of changes in the complex of current life both physical and spiritual and, being an effect (an affect, too, already produced), it is bootless to cry out against it.

Passing then the question as to what one may think of the ultimate wisdom of the changes in prevalent notions as to desired social ends, there is to be recognized the ever present problem of making the law "an expression of developing ideas of right rather than a petrifying formulation of quondam beliefs." This problem was well stated in that notable address by Professor Wesley Newcomb Hohfeld before the meeting of the Association of American Law Schools in 1914.[1] This address has received nothing like the attention which its importance merits. Professor Walter Wheeler Cook in discussing Professor Hohfeld's contributions to the science of law said:

> The address . . . was a summons to the law schools of the country to awake and do their full duty in the way of training men, not merely for the business of earning a living by "practicing law," [2] but also for the larger duties of the profession, so that they may play their part as judges, as legislators, as members of administrative commissions, and finally as citizens, in so shaping and adjusting our law that it will be a living, vital thing, growing with society and adjusting itself to the *mores* of the times.

Parts of this address pertinent to the present purpose are quoted.

> I come now to critical, or teleological jurisprudence, a fourth department of studies and activities specially necessary for the jurist, though very valuable also for the ordinary practicing lawyer or judge. Even in connection with historical, comparative and analytical study, one of the objects is, as already emphasized, to develop an inquiring and critical attitude toward the existing principles and rules of law. Thus, formal, or analytical, jurisprudence has as one of its principal purposes the testing and criticism of our principles and rules of law according to *intrinsic* or *internal* considerations of logical consistency and system. On the other hand, I mean to include under critical, or teleological, jurisprudence proper the *systematic* testing or critique of our principles and rules of law according to considerations *extrinsic* or *external* to the principles and rules as such, that is, according to the psychological, ethical, political, social and economic bases of the various doctrines and the respective purposes or ends sought to be achieved thereby.
>
> As early as 1345, resting upon the doctrine of fixed precedent, counsel said to the court of common pleas, "I think you will do as others have done in the same case, or else we do not know what the law is." "It is the will of justices," replied Justice Hillary—probably in jest, thinks Sir Fredrick Pollock. "No," retorted Chief Justice Stonore, "law is reason."
>
> Well, it could hardly be contended that each and all of our rules of law are, at any one time, the perfect embodiment of reason; and, especially as ethical standards, social conditions, and economic requirements are gradually shifting, it would seem that the tests of genuine reason must ever be applied to what Coke calls the *"artificial* reason and judgment of the law." . . .
>
> I might, of course, give a vast number of specific legal problems involving teleological considerations which should be dealt with as part of a system of principles. As examples I might mention on the civil side, liberty of contract, usury transactions, forfeitures, workmen's compensation, strikes and boycotts and other problems of capital and labor, the doctrine of Rylands vs. Fletcher, etc. Some of you will recall that very difficult book of Professor Seligman entitled "The Shifting and Incidence of Taxation." Well, it seems to me that not only rules of taxation, but also many other legal rules and the burdens or liabilities created thereby, involve complicated actions and reactions that ought to be worked out carefully and systematically so as to develop consistency and give a more scientific basis for future legislation. On the criminal side also we have many grave teleological problems involved in the various crimes and in the punishments provided such as capital punishment, indeterminate sentences, parole, etc.
>
> It would be altogether unjust to overlook the fact that the better teachers of law are, especially under the case method, constantly seeking by class discussions of specific doctrines and concrete cases to bring out the underlying policies and purposes, and to test every principle and rule of law accordingly. An interesting and successful attempt to elevate this sort of teleological study into a position of prominence is represented in Professor Wigmore's profound and scholarly two-volume case book on "Torts." Along with the representative groups and sub-groups of cases and judicial *rationes decidendi* are printed appro-

(1) Proceedings, 1914.

(2) The antithesis here implied is largely imaginary and increasingly so as the study of a modern successful practice will convince one.

(3) 28 Yale Law Journal 738.

priate extracts from both legal and lay writers, including economists, novelists, dramatists, and poets, all calculated to suggest the teleological bases of the various principles and rules of law.

This teleological study must, of course, continue to form a very important part of the ordinary professional courses; for only by doing so shall we elevate the practice of law and the administration of justice above a mere mechanical trade; only so shall our lawyers and judges know "the reason of the rule" and hence be able to determine its proper limits in relation to new sets of facts.

But even though the teleological bases of the law must continue to form an inextricable and valuable part of each individual course, is it not possible to conceive of very valuable conclusions and reactions, both for professional study and practice, and for the constantly increasing judicial and legislative law-making of the future, as a result of a more comprehensive, coordinated and synthetic consideration of the underlying psychological, ethical, political, social and economic causes and purposes of the various branches and specific rules of the law? It would seem that only one answer to this question can fairly be given; for in the numerous and scattered professional courses, the discussions of policies and purposes of each detailed rule must necessarily be more or less incidental and subordinate to the ascertaining and learning of the rule itself——be it good or bad; and the *very multiplicity of detailed rules and special policies* tends to prevent a comprehensive and synthetic view for the whole system of law or for the leading parts thereof.[4] Yet such a view is quite essential if we are to coordinate the various underlying purposes of legal doctrines and develop something like a self-consistent system for the purpose of testing our already existing principles and rules and also for the purpose of making our future legislation more rational, consistent, effective and beneficial than it has been in the past.

So far as law in the past has failed to so mold itself as less harshly to fit the life which fills it out, it has been largely due to defects in legal methods, for it is not to be overlooked that, whether consciously or not, law has been changing to meet changing needs and these changes have taken place in a manner of such uniformity that a method has been present though seldom recognized and never examined upon its merits. What is the most desirable method for the law, and for the other social sciences for that matter? For law alone, that is a hard question whose answer will come only after much time and in broken bits. Before that constructive task can be finished or even well begun, there is still much to be done in clearing the ground by repeatedly pointing out the defects in present methods.

Among recent notable contributions to the consideration of the question of a sound method in legal investigations is that made by Professor Léon Duguit in his study, "Objective Law."[5] One of his sentences is most pointed:

> The fact is that in the century which has been preeminently that of the positive sciences, the domain of the law has remained encumbered with notions of a purely metaphysical character; that we have not succeeded in applying to the study of the juridical problem a genuinely and exclusively realistic method.

The work of Dean Roscoe Pound from the critical angle has been so comprehensive throughout the whole field of this question as to give it precedence over that of any other American legal scholar.

In the Michigan Law Review for January 1921, Professor John Barker Waite under the heading, "Public Policy and Personal Opinion," makes a distinct and important contribution to the discussion of legal method which it will be useful partly to reproduce here.

A certain narrow theory of law predicates its specific rules on a Divine Preordination, which makes their eternal immutability transcendent of human ideas of utility. "Precedents and rules must be followed even when they are flatly absurd and unjust, if they are agreeable to ancient principles." Practically, however, the matter of current utility does affect the decision of cases, even in the face of precedent. Lord Haldane but put this fact into words when he said, "I think that there are many things of which the judges are bound to take judicial notice which lie outside the law properly so called, and among those things are what is called public policy and the changes which take place in it. The law itself may become modified by this obligation of the judges." . . .

There can be no question but that where no rule at all has been definitely precipitated, judicial decisions are time and again founded on nothing but the judicial apprehension, or conception, of public policy. Every adjudication that some novel statute does or does not constitute "due process of law" is of this type. . . .

Between judge-selected law and judge-made law there is a world of philosophic distinction and some real difference. "Selection" presupposes that the substance of whatever rule is followed has originated extraneously to the judicial mind. Selection, while it does vest in the judge a real discretionary power, is nevertheless antithetical to the idea of free legislative power in the judiciary.

Decisions which are wholly pragmatic and have no foundation in either precedent or definite custom must be, at their very best, on the border line between selection and creation. The grave objection to such decisions is expressed by Baron Parke in his statement that "public policy" is "a vague and unsatisfactory term, and calculated to lead to uncertainty and error, when applied to the decision of legal rights; it is capable of being understood in different senses; it may, and does, in its ordinary sense, mean 'political expediency,' or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits, talents, and dispositions of each person, who is to decide whether an act is against public policy or not. To allow this to be a ground of judicial decision would lead to the greatest uncertainty and confusion. It is the province of the statesman, and not the lawyer, to discuss, and of the legislatures to determine, what is the best for the public good. It is the province of the judge to expound the law only: . . . not to speculate upon what is the best in his opinion, for advantage of the community."

Despite this undeniably forceful objection to any purely utilitarian—which means, in effect, to any unprecedented—decision, courts do constantly render such decisions. And if the common law is to be an expression of developing ideas of right rather than a petrifying formulation of quondam beliefs, courts must continue to provide the vital metabolism by eliminating obsolete ideas and formulating into law those new theories which have prevailed in the conflict of ideas. When judges base their opinions, in these progressing decisions, upon facts as they exist, or upon truly prevailing beliefs, they are, in a measure at least, selecting a rule; they are restricted by a certain fitness of conclusion to the facts. But when the very facts upon which such a conclusion is based are themselves empirical conclusions of the judicial mind, then there can be no pretense of anything but judicial free-will in the decision, and it is open to all the objections raised by Baron Parke. . . .

The extent to which such empiricism may lead a court is shown in the opinion of the New York court which held unconstitutional a statute aimed at bettering conditions in the slums of New York City and alleviating the frightful conditions prevailing in crowded tenement houses. The court's reason was that "It cannot be conceived how the cigarmaker is to be improved in health or morals by forcing him from his (tenement) home and its hallowed association and beneficent influences to ply his trade elsewhere. . . ."

When courts do render decisions founded on their own conceptions of public policy, whether they call the decision "conclusions of fact" or applications of "law," the very public good which they are seeking requires adherence to the principle that, in the words of Mr. Justice Brandeis, "To decide wisely it is necessary to consider the relevant facts, industrial and commercial."

A legal methodology in which "the very facts upon which" conclusions are "based are themselves empirical conclusions of the judicial mind" is far from a realistic

(4) These are the least serious of the faults common to such discussions. See the criticisms of the "common-sense" method printed further along.

(5) Columbia Law Review, December 1920 *et seq.*

one. Professor Waite has put his finger upon the very point in our legal methodology which is one of the prime sources of our difficulties and to which our attention should be repeatedly directed to the end that the method may be abandoned, wherever invalid, and a realistic method substituted.

A careful marshalling of the concrete reasons for abandoning the empirical method is to be found in a critical examination of that method in use in another of the social sciences, viz., Sociology, which examination has been made by William I. Thomas and Florian Znaniecki in their five-volume work, "The Polish Peasant in Europe and America." The extract printed below is a part of a Methodological Note occupying eighty-six pages of the first volume. Although this is a study of a methodology in Sociology, its value to students of law is little impaired because the problem of method is much the same in all of the social sciences. Its criticisms of existing methods and its bold attempt concretely to set out a truly realistic method together with the thoughtfulness with which both of these things have been done make this document one of the outstanding contributions to the problem of method in all of the social sciences, law among them.

Particular attention is called to the following discussion of the "common-sense method" viewed as an elaboration of Professor Waite's discussion of empirical conclusions of the judicial mind.

> The oldest but most persistent form of social technique is that of "ordering-and-forbidding"—that is, meeting a crisis by an arbitrary act of will decreeing the disappearance of the undesirable phenomena, and using arbitrary physical action to enforce the decree. . . .
>
> A more effective technique, based upon "common sense" and represented by "practical" sociology, has naturally originated in those lines of social action in which there was either no place for legislative measures or in which the *hoc volo, sic jubeo* proved too evidently inefficient—in business, in charity and philanthropy, in diplomacy, in personal association, etc. Here, indeed, the act of will having been recognized as inefficient in directing the causal process, real causes are sought for every phenomenon, and an endeavor is made to control the effects by acting upon the causes, and, though it is often partly successful, many fallacies are implicitly involved in this technique; it has still many characters of a planless empiricism, trying to get at the real cause by a rather haphazard selection of various possibilities, directed only by a rough and popular reflection, and its deficiencies have to be shown and removed if a new and more efficient method of action is to be introduced.
>
> The first of these fallacies has often been exposed. It is the latent or manifest supposition that we know social reality because we live in it, and that we can assume things and relations as certain on the basis of our empirical acquaintance with them. The attitude is here about the same as in the ancient assumption that we know the physical world because we live and act in it, and that therefore we have the right of generalizing without a special and thorough investigation, on the mere basis of "common sense." The history of physical science gives us many good examples of the results to which common sense can lead, such as the geocentric system of astronomy and the mediæval ideas about motion. And it is easy to show that not even the widest individual acquaintance with social reality, not even the most evident success of individual adaptation to this reality, can offer any serious guaranty of the validity of the common-sense generalizations.
>
> Indeed, the individual's sphere of practical acquaintance with social reality, however vast it may be as compared with that of others, is always limited and constitutes only a small part of the whole complexity of social facts. It usually extends over only one society, often over only one class of this society; this we may call the exterior limitation. In addition there is an interior limitation, still more important, due to the fact that among all the experiences which the individual meets within the sphere of his social life a large, perhaps the larger, part is left unheeded, never becoming a basis of common-sense generalizations. This selection of experiences is the result of individual temperament on the one hand and of individual interest on the other. In any case, whether temperamental inclinations or practical considerations operate, the selection is subjective—that is, valid only for this particular individual in this particular social position—and thereby it is quite different from, and incommensurable with, the selection which a scientist would make in face of the same body of data from an objective, impersonal viewpoint.
>
> Nor is the practical success of the individual within his sphere of activity a guaranty of his knowledge of the relations between the social phenomena which he is able to control. Of course there must be some objective validity in his schemes of social facts—otherwise he could not live in society—but the truth of these schemes is always only a rough approximation and is mixed with an enormous amount of error. When we assume that a successful adaptation of the individual to his environment is a proof that he knows this environment thoroughly, we forget that there are degrees of success, that the standard of success is to a large extent subjective, and that all the standards of success applied in human society may be—and really are—very low, because they make allowance for a very large number of partial failures, each of which denotes one or many errors. Two elements are found in varying proportions in every adaptation; one is the actual control exercised over the environment; the other is the claims which this control serves to satisfy. The adaptation may be perfect, either because of particularly successful and wide control or because of particularly limited claims. Whenever the control within the given range of claims proves insufficient, the individual or the group can either develop a better control or limit the claims. And, in fact, in every activity the second method, of adaptation by failures, plays a very important role. Thus the individual's knowledge of his environment can be considered as real only in the particular matters in which he does actually control it; his schemes can be true only in so far as they are perfectly, absolutely successful. And if we remember how much of practical success is due to mere chance and luck, even this limited number of truths becomes doubtful. Finally, the truths that stand the test of individual practice are always schemes of the concrete and singular, as are the situations in which the individual finds himself.
>
> In this way the acquaintance with social data and the knowledge of social relations which we acquire in practice are always more or less subjective, limited both in number and in generality. Thence comes the well-known fact that the really valuable part of practical wisdom acquired by the individual during his life is incommunicable—cannot be stated in general terms; everyone must acquire it afresh by a kind of apprenticeship in life—that is, by learning to select experiences according to the demands of his own personality and to construct for his own use particular schemes of the concrete situations which he encounters. Thus, all the generalizations constituting the common-sense social theory and based on individual experience are both insignificant and subject to innumerable exceptions. A sociology that accepts them necessarily condemns itself to remain in the same methodological stage, and a practice based upon them must be as insecure and as full of failures as is the activity of every individual.

It is difficult to believe that the foregoing defects of the "common sense method" which produces the "empirical conclusions of the judicial mind" can be thoughtfully considered without a keen awareness of the need for great caution in its use in government and of the need for a method and the administrative machinery necessary to avoid resort to it so far as possible. Under our hands lies the task of finding that method and of shaping that machinery.

Chicago. HERMAN OLIPHANT.

Louisiana Kills I. & R.

With only three votes cast in its favor, an ordinance submitted to the constitutional convention, now in session, providing for the initiative and referendum was killed.

FEDERAL JUDICIAL WORK IN SEVENTH CIRCUIT

A contribution to the current discussion, in Congress and out, of what shall be done to expedite and improve the transaction of business in the Federal Courts is furnished by certain statistics of the business of the U. S. District Courts for the Seventh Circuit which have been prepared by the clerks of each of the districts, on the request of the several presiding judges. These deal with the business between Dec. 1, 1919 and Dec. 1, 1920, excepting that in the Eastern Division of the N. D. of Ill., the figures are for the period between July 1, 1920 and Dec. 1, 1920.

The first thing that strikes one in glancing over the figures is that the impression in some quarters that the Volstead Act and other criminal statutes are mainly responsible for whatever congestion may exist does not appear to be justified. There has indeed been an increase in the criminal business, but this has been the case in all the other branches, except for the Eastern Division of the Northern District of Illinois, and in that the Chancery branch is the only one which shows a decrease in business.

Comparing the various districts, it is to be noted that only one judge kept ahead of the incoming volume of business. In the District of Indiana the number of cases disposed of exceeded the cases begun by 223. However, in certain other districts the judges kept fairly up with the work as it came in. The greatest excess of cases begun over cases disposed of was in the Eastern and Southern Districts of Illinois and in the Eastern Division of the Northern District. Some help is apparently needed here, but it is a question whether a great deal could not be afforded by having judges in districts with the least congested dockets help out where the need is greater and also by some method whereby the business of the several Districts in the Circuit could be systematized, instead of allowing it to proceed without any particular organization or definite plan of cooperation.

The figures for the Seventh Circuit may or may not be typical of the situation in the rest of the country. At any rate, they are significant as representing the state of Federal Judicial business in a large and important area. A compilation of such figures for all the other circuits and a comparison might possibly furnish suggestions for a fair measure of relief by means of greater system and direction of the business. There is a great deal of valuable information on the subject in the Reports of the Attorney General, but the figures which follow are in a condensed form and brought as nearly up to date as possible:

DISTRICT OF INDIANA

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	113	175	350	160	1	799
Begun between Dec. 1, 1919, and Dec. 1, 1920.	47	127	73	167	..	414
	160	302	423	327	1	1213
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	51	129	358	109	..	647
Cases pending Dec. 1, 1920.	109	173	65	218	1	566

WESTERN DISTRICT OF WISCONSIN

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	51	28	269	44	5	397
Begun between Dec. 1, 1919, and Dec. 1, 1920.	15	86	190	17	2	310
	66	114	459	61	7	707
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	14	98	156	9	2	279
Cases pending Dec. 1, 1920.	52	16	303	52	5	428

EASTERN DISTRICT OF WISCONSIN

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	..	130	71	122 (and Chan.)	13	336
Begun between Dec. 1, 1919, and Dec. 1, 1920.	35	193	131	13	25	397
	35	323	202	135	38	733
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	21	209	105	28	24	387
Cases pending Dec. 1, 1920.	14	114	97	107	14	346

EASTERN DISTRICT OF ILLINOIS

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	53	178	181	59	8	479
Begun between Dec. 1, 1919, and Dec. 1, 1920.	26	102	434	80	26	668
	79	280	615	139	34	1147
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	25	73	319	49	17	483
Cases pending Dec. 1, 1920.	54	207	296	90	17	664

SOUTHERN DISTRICT OF ILLINOIS

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	74	605	328	64	5	1076
Begun between Dec. 1, 1919, and Dec. 1, 1920.	23	151	598	57	26	855
	97	756	926	121	31	1931
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	14	58	437	30	10	549
Cases pending Dec. 1, 1920.	83	698	489	91	21	1382

NORTHERN DISTRICT OF ILLINOIS
Western Division

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending Dec. 1, 1919....	14	34	1	5	27	81
Begun between Dec. 1, 1919, and Dec. 1, 1920.	11	22	3	4	10	50
	25	56	4	9	37	131
Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	6	20	3	1	2	32
Cases pending Dec. 1, 1920.	19	36	1	8	35	99

NORTHERN DISTRICT OF ILLINOIS
Eastern Division (for 5 mo.)

Cases on Docket:	Chanc'y	Bankr'y	Crim.	Com. Law	Others	Total
Pending July 1, 1920....	609	1084	499	420	11	2623
Begun between July 1, 1920, and Dec. 1, 1920	227	283	256	125	69	960
	836	1367	755	545	80	3583
Cases disposed of between July 1, 1920, and Dec. 1, 1920	334	145	66	51	50	646
Cases pending Dec. 1, 1920.	502	1222	689	494	30	2937

SUMMARY

	Cases pending Dec. 1, 1919	Cases begun between Dec. 1, 1919, and Dec. 1, 1920	Cases disposed of between Dec. 1, 1919, and Dec. 1, 1920	Cases pending on Dec. 1, 1920	Cases disposed of exceed cases begun by	Cases begun exceed cases disposed of by
Dist. of Indiana.....	799	414	647	566	233	..
Western Dist. of Wis.....	397	310	279	428	..	31
Eastern Dist. of Wis.....	336	397	387	346	..	10
Eastern Dist. of Illinois...	479	668	483	664	..	185
Southern Dist. of Illinois..	1076	855	549	1382	..	306
No. Dist. of Ill., W. Div..	81	50	32	99	..	18

	Cases pending July 1, 1920	Cases begun between July 1, and Dec. 1, 1920	Cases disposed of between July 1 and Dec. 1, 1920	Cases pending on Dec. 1, 1920	Cases begun exceed cases disposed of by
No. Dist. of Ill., E. Div	2623	960	646	2937	314

SOME PROBLEMS OF PROCEDURAL REFORM

Account of the Part Played by the American Bar Association in the Effort to Improve Methods of Administering Justice

By G. E. Osborne
Assistant Professor of Law, West Virginia University

IN treating this subject it is obviously impossible to trace the result of action by the Association in all cases. Its most powerful influence is felt often indirectly through its effect upon the thought of the members of the Association. They carry away ideas which they advocate as individuals, and not in the name of the Association. Furthermore, to attempt a complete critique of all the measures discussed and endorsed by the Association would be beyond the possible scope of this paper. All that is proposed is to indicate the various problems of procedural reform that have been considered by the Association, to see what the attitude toward these measures has been, to examine the reasons advanced *pro* and *con* and, whenever possible, to show the tangible fruits of action by the Association.

Taking Testimony Out of Court

At the first meeting of the Association a resolution[1] was adopted instructing an investigation of "the mode of taking testimony and perpetuating testimony out of court" in the several states. Four years later the committee rendered a comprehensive report giving in detail the requirements in force in twenty-six states.[2] Though the result showed a great diversity and multiplication of laws and practice, the committee was able to detect certain defects that were general, and suggestions were framed to meet them. The chief evil found was the inexperience and incapability of the officers who were usually employed to take depositions. To remedy this it was recommended that authority to take depositions be conferred only on a strictly limited number of special commissioners appointed by the county courts.[3] Two other suggestions were: first, that each state should require witnesses to attend and testify in their own place of residence upon proper requisition from another state or county; second, that the adverse party, where depositions are to be taken out of the state should have the option, by prompt action, of having the deposition taken without attendance of parties or attorneys on interrogatories and cross interrogatories.[4] The advantage of this last proposal lay in its saving of expense. There would be no injustice, since the option lay with the party having the right of cross-examination. The report was adopted without comment.[5] The matter has not been referred to again.

The patching method urged in this report should be compared with the provisions of the English Judicature Act of 1875.[6] There, recognizing that deposition machinery for taking testimony out of court was unsatisfactory, the act cleared away the ancient forms with sweeping provisions and allowed the courts, at any time, for sufficient reason, to order that facts might be proved by affidavit at trial or hearing on such conditions as the judge deemed reasonable.

1. 1 A. B. A. R. 27. (1878).
2. 5 A. B. A. R. 309. (1882).
3. 5 A. B. A. R. 320. (1882).
4. 5 A. B. A. R. 321. (1882).
5. 5 A. B. A. R. 12. (1882).
6. Act of 1875, § 20, Ord. 37, 38.

Reorganization of the Federal System of Courts

By the year 1881 two conspicuous defects in the federal system of courts were demanding attention. The Supreme Court had become swamped by the cases coming to it for decision. It was estimated that it would usually take three years to carry a case to a decision by the Supreme Court.[7] It was considered impossible for the court to decide, on an average, more than 360 cases; the average annual accession of new cases was 425.[8] In the year 1880-1881 there were 837 cases left over undecided.[9] Seven bills, three in the House, and four in the Senate, had been introduced to remedy the situation.[10]

The other flaw was that there was no review of a federal district court's decision in causes involving less than $5,000.[11] This matter was of minor importance, but was not lost sight of in urging plans to achieve some solution of the first problem.

In 1881 the Association appointed a committee to inquire into the delays in the Supreme Court.[12] This committee the following year returned two reports: a majority report advocating the establishment of intermediate courts of appeal;[13] a minority report recommending the dividing of the Supreme Court into sections, a plan somewhat analogous to the present English system.[14] The majority report was adopted after prolonged debate by a vote 39 to 27.[15]

Several objections were strongly advanced in opposition to the defeated plan. It was argued that it would be unconstitutional because Art. III, §1 of the Constitution provides that there shall be "one Supreme Court." To cut it into sections would be really to create three separate courts.[16] Conceding that Congress could make less than a majority a quorum it would only mean that such a number duly assembled as a court was sufficient, and that the absentees would, for the time being, be considered as no part of it.[17] In reply, the minority urged that there was a provision for the full court to consider each decision with power to order a rehearing and to enter the decision of each section, after such consideration, as the judgment of the whole court: that Congress

7. See discussion in 4 A. B. A. R. 34. (1881); 6 A. B. A. R. 314. (1883).
8. 5 A. B. A. R. 345. (1882).
9. 5 A. B. A. R. 345. (1882).
10. 5 A. B. A. R. 347. (1882).
11. 6 A. B. A. R. 319. (1883).
12. 4 A. B. A. R. 84. (1881).
13. 5 A. B. A. R. 343 et seq. (1882).
14. 5 A. B. A. R. 363. (1882) *et seq.* A plan for the enlarging the Supreme Court to eighteen and dividing it into two sections of nine each with review in certain cases by the full court was proposed by one of the bills in Congress. There were two objections especially urged: 1. No increase in the size of the court was desired or needed. 2. Its effect would be to create a new appellate court at Washington which would be inconvenient both to suitors and the profession except those near Washington. It was not recommended by either report. See 5 A. B. A. R. 345 (1882).
15. 5 A. B. A. R. 101. (1882).
16. 5 A. B. A. R. 354. (1882).
17. 5 A. B. A. R. 355. (1882).

could determine the size of the court and set the number necessary for there to be a quorum to transact business, therefore there was no reason why Congress could not authorize a number of judges less than a majority to sit; and, as a corollary to this, Congress could authorize two divisions to sit at the same time.[18]

The constitutional difficulty was not, however, the only one raised. Others were: that it would impair the dignity of the court and the authority of its decisions;[19] that it was opposed by the judges of the Supreme Court;[20] that it provided no method of reviewing the decisions of district judges;[21] and, if all the judges conscientiously examined each case, very little time would be gained.[22] Because of these objections this plan was virtually dead by 1889.[23] In 1916, however, when the Supreme Court was again becoming embarrassed by the amount of its business, the idea was revived in a slightly different form so as to obviate some of the difficulties. The plan then proposed was to increase the number of the court to fifteen with the proviso that not more than nine should sit on any one case and that five only would be necessary to a decision. This would enable the court to transact business through a long term without recess.[24] The plan was not pressed because the Supreme Court opposed it and believed it could cope with the increased number of cases by delivering fewer opinions, and by making the opinions delivered more concise.[25]

Though the Association adopted the principle of intermediate courts as a solution of the difficulty, the details were long debated.[26] In 1883 a group of Pennsylvania lawyers submitted what was called the Philadelphia Plan, whose chief feature was that there was to be one intermediate court holding sessions at different times of the year in four sections of the country.[27] One valuable work of the report on the plan was an analysis of the cases going to the Supreme Court. This showed that one in every three cases came up on the sole ground of diversity of citizenship, there being no point of federal law of any kind involved.[28] Here, it was suggested, was a legitimate field for restriction by changing the law which permitted removal on grounds of citizenship[29] in two ways: first, by never allowing a plaintiff who has brought a suit in the state court to remove since he has chosen it as his forum; second, since the only theoretical reason for removal is the supposed prejudice existing in state courts in favor of its own citizens, only defendants not citizens of the state where suit is brought should be allowed to remove, and even these only on affidavit that they believe they will be prejudiced.[30] This suggestion was partially enacted later,[31] but the Philadelphia Plan, as a whole, was not favorably received and was never accorded any general support.[32]

Though the Association actively pressed Congress for legislation on the subject for several years,[33] it was not until 1890 that strenuous measures were adopted. In that year the coöperation of the state bar associations was enlisted; the President was requested to, and did, mention the matter in his message to Congress; a memorial was prepared and sent out to lawyers throughout the country asking Congress to act, large numbers of which were signed and sent to representatives and senators; and a committee of the Association appeared before the Judiciary Committees of both branches of Congress.[34] Largely due to this agitation Congress passed the act creating Circuit Courts of Appeal, Act of March 3, 1891.[35] This act left the Circuit Courts still in existence, but in 1911 the Judicial Code consolidated the Federal Courts of original jurisdiction into a court known as the District Court of the United States in each judicial district and abolished Circuit Courts.[36]

The reform lived up to expectations. The Supreme Court was relieved of its overburden of appealed cases. In 1893, of 542 cases which went to the new Circuit Court of Appeals only 29 were carried to the Supreme Court.[37] For a quarter of a century it functioned very satisfactorily. Even today the Supreme Court, though again somewhat pressed by business, feels that it can satisfactorily do all the work it is called on to perform.[38]

Preventive Relief

In 1913 the Association committee considering procedural reforms suggested, though it did not recommend, that delay and expense in administering justice might be reduced if preventive relief were further developed.[39] At present it might be said of the law that one must commit a wrong to find out one's rights. The committee's idea was that courts might be given power to construe contracts of doubtful meaning in advance;[40] or, in another field, they might determine questions of testamentary capacity and undue influence at the time the will was made and thus avoid long and expensive litigation. The suggestion has not yet been followed up by the Association.

Appointment of Clerks in Federal Courts

In 1916 a bill was introduced in Congress proposing to take away the appointment of clerks in federal courts from the judges and give it to the President.[41] It was opposed by the Association on the ground that it would serve no useful purpose and only result in putting this part of the judicial system into politics. It did not become law.[42]

Record on Appeals and Writs of Errors

In 1909 the practice in taking up the record on appeal of error was to file a written or typewritten

18. 5 A. B. A. R. 370. (1882). A New Jersey case supports this contention of the minority. *Wood* v. *Fithian*, 4 Zab. 838.
19. A. B. A. R. 356. (1882); 6 A. B. A. R. 378. (1883); 12 A. B. A. R. 309.
20. 12 A. B. A. R. 309. (1889).
21. 6 A. B. A. R. 318. (1883).
22. 6 A. B. A. R. 318. (1883).
23. 12 A. B. A. R. 309. (1889).
24. 2 A. B. A. J. 611. (1916).
25. 42 A. B. A. R. 335. (1917).
26. There were two objections made: first, that the law could not be homogeneous with intermediate courts whose decisions on cases involving less than $10,000 would be final, without the corrective of one Supreme Court passing on them; second, that in order to get to the Supreme Court it would be necessary for those who could go there to bear the burdensome expense and trouble of two appeals. 5 A. B. A. R. 375. (1882). The first objection is at present met partially by Jud. Code, § § 239, 240. § 239 allows the circuit court of appeals to certify any question of law to the Supreme Court for decision; § 240 allows the Supreme Court to review by *certiorari* any decision of the circuit court of appeal which would be final.
27. 6. A. B. A. R. 313. (1883).
28. 6 A. B. A. R. 320. (1883). For a later analysis showing the same proportion, see 12 A B. A. R. 314. (1889).
29. Rev. Stat. § § 639, 640.
30. 6 A. B. A. R. 333. (1883).
31. Jud. Code § 28.
32. 12 A. B. A. R. 312. (1889). The chief objection to the plan was that it would only transfer the congestion from the Supreme Court to one intermediate appellate court.
33. See the reports of the Committee on Judicial Administration in the years from 1883 to 1890 in the Association Reports.
34. 13 A. B. A. R. 388. (1890).
35. Rev. Stat. § 719.
36. 36 A. B. A. R. 452. (1911); Jud. Code § § 289, 290, 291.
37. 17 A. B. A. R. 338. (1894).
38. 42 A. B. A. R. 335. (1917).
39. 38 A. B. A. R. 553. (1913).
40. The English law now permits this by rule of court. Ord. 54a, Rule 1, provides, "In any division of the High Court any person claiming to be interested under a deed, will, or other written instrument may apply by originating summons for the determination of any question of constructions arising under the instrument, and for a declaration of the rights of the persons interested." See also Ord. 25, Rule 5.
41. 41 A. B. A. R. 542. (1916).
42. 3 A. B. A. J. 509. (1917).

transcript of the record below. In addition there had to be a printed copy made from the transcript. This expensive method was merely a historical survival without justification for continuing. The Association desired to eliminate the transcript and have the printed copy made direct from the original record in the court below.[43] Though the Asosciation's bill was not enacted, one drawn by the Bar Association of the State of Washington intended to effect the same reform was passed by Congress and signed by the President.[44]

Testimony in Equity Cases

Under the old practice in equity cases many district federal courts would not listen to oral evidence. All of it had to be reduced to writing and, in some districts printed. The disadvantages of this method were that all evidence from the personality of the witness was lost; the witness not being under direct control of the court was more likely to testify falsely; and, most important, the litigants were exposed to a great amount of unnecessary delay and expense. To meet these faults the Association recommended that witnesses be allowed to give evidence orally in open court.[45] Two years after the adoption of this proposal the reform advocated was put into effect by a rule of the Supreme Court in Equity.[46]

Testimony in Admiralty Case

By rule of the Supreme Court the same practice in taking evidence that obtained under the old equity practice was in force in admiralty.[47] The Association made the same recommendation as to reform,[48] but the change has not yet been effected.

Writs of Error in Constitutional Cases

The original Judiciary Act provided that the Supreme Court might review by writ of error a judgment of the highest court of the state in which a party had asserted a claim under the Constitution and laws of the United States and the decision of the state court had been adverse to this claim.[49] When adopted it was thought that the main ground for giving this jurisdiction was that there might be jealousy of the federal government on the part of state courts. Therefore, when the decision of the state court was in favor of the right asserted under the federal constitution it was thought there would be no just ground for complaint. Under it, if the state court decided its own statute violated the federal constitution there was no review by the Supreme Court of the United States. The lapse of over a century brought changed conditions. The federal courts had become more liberal in their construction of what violated the constitution while the state courts were inclined to be very narrow. The result was that the state courts would uphold the United States constitution against state statutes where the federal court would have ruled otherwise. In 1911 the New York State Courts, in the much condemned case of Ives v. South Buffalo R. Co.,[50] held that the New York Workmen's Compensation Act was in violation of the United States Constitution. There was a storm of criticism and the desire for a change in the rule became acute.[51] The Association drafted a bill which was urged upon Congress providing for review in the Supreme Court by writ of error of the decisions of state courts when their decisions were in favor of the claim that a state statute violated the United States Constitution or in favor of some right under the Constitution.[52] This was changed in the Senate to permit review by *certiorari*, instead of by writ of error. It was passed by Congress, and became law December 23, 1914.[53]

The Law and Equity Bill

It was long the practice in the federal courts to dismiss a suit which was held to have been brought on the wrong side of the court; to compel the party wishing to avail himself of an equitable defense to bring a separate suit on the equity side; and to require a party desiring equitable relief in the form of an injunction to preserve the *status quo* pending actions at law to seek it in an independent suit with new process. The rules grew out of the complete separation of law and equity in federal procedure. To change these expensive and unnecessary rules, the Association drafted a bill to amend the Judicial Code by adding two new sections.[54] The first section provided in substance that there should be a power of amendment from law to equity and from equity to law.[55] The other allowed equitable defenses and replications at law.[56] A remedy for the third evil was not advocated in the statute because it could be taken care of by a rule of court providing for the exercise of the power to grant ancillary equitable relief, on petition and notice, in the legal controversy itself.[57]

The proposed amendments at once raised constitutional questions. Was not the provision extending the judicial power "to all cases of law and equity"[58] violated? Did they not run counter to the jury trial provision in the Seventh Amendment? In a report carefully considering the decision Dean Pound came to the conclusion that these reforms were constitutional. His reasoning was as follows:[59]

> The constitution gives the courts both legal and equitable remedies so that neither may be taken away by legislation. The constitution preserves a right to jury trial of issues triable only in an action at law under the common law, which cannot be taken away though it may be waived by the party entitled. If the remedies and right so secured are not taken away or impaired, the mere manner in which the remedy shall be sought and the issue to be tried shall be presented is subject to legislative control. Hence, if anything, legislation only

43. 34 A. B. A. R. 609. (1909).
44. 36 A. B. A. R. 455. (1911).
45. 36 A. B. A. R. 456, 466, Schedule B. (1911).
46. Rule 46 provides: In all trials in equity the testimony of the witnesses shall be taken orally in open court except as otherwise provided by statute or these rules.
47. Rule 44 of the Supreme Court in Admiralty.
48. 35 A. B. A. R. 65, 617. (1910).
49. Judiciary Act of 1789, § 25; Jud. Code, § 237. This provision was held constitutional in Martin v. Hunter's Lessee, 1 Wheat. (U. S.) 304.
50. 201 N. Y. 271. (1911).
51. 36 A. B. A. R. 463. (1911).
52. 37 A. B. A. R. 559. (1912).
53. 38 U. S. Stat. 790; Jud. Code, § 237. Two years later the law was revised. Apart from rephrasing the provisions to make them more explicit, the only change enacted was to allow state decisions denying a title, right, privilege, or immunity set up under the laws or authority of the United States to be reviewed by *certiorari* only. Formerly such a decision could be reviewed by writ of error. 39 U. S. Stat. 726. See Williams, Jurisdiction and Practice of Federal Courts, 492 *et seq.*
54. 36 A. B. A. R. 462. (1911). The proposed amendments were to be §§ 274a, 274b.
55. 36 A. B. A. R. 468. (1911).
56. Proposed § 274b read as follows: "In all actions at law equitable defenses may be interposed by answer, plea, or replication without the necessity of filing a bill on the equity side of the court. The defendant shall have the same rights in such case as if he had filed a bill embodying the equitable defense or seeking the relief prayed for in such answer or plea. Equitable relief respecting the subject matter of the suit may thus be obtained by answer or plea. In case affirmative relief is prayed in such answer or plea, the plaintiff shall file a replication. Review of the judgment or decree entered in such case shall be regulated by rule of court. Whether such review be sought by writ of error or by appeal, the appellate court shall have full power to render such judgment upon the record as law and justice shall require."
57. 36 A. B. A. R. 477. (1911).
58. Const. Art. 3, § 2.
59. 36 A. B. A. R. 475. (1911).

requires the present complete and absolute separation of law and equity in federal procedure.

A further question was whether it was necessary to resort to legislation to accomplish the desired changes. In New Hampshire it was held that the power to amend from law to equity and *vice versa* was a corollary of the vesting of legal and equitable powers in one set of courts.[60] In the federal courts, since the federal practice at law conforms to the state practice, which in most jurisdictions under codes of procedure allow such amendments, it would seem still easier to make the same ruling.[61] Moreover, the power of the Supreme Court to make equity rules might be invoked,[62] and there is authority for such amendment without even a federal equity rule.[63] However, the federal courts have so clearly assumed that the Judiciary Act of 1789[64] and the Act of May 8, 1792[65] created a procedural distinction, that legislation was a better means of procuring the reform.

The allowing of equitable defences and replications at law involved two difficulties. One was the necessity of preserving the constitutional right to jury trial of legal issues.[66] The other was as to the mode of review, i. e., whether it should be by an equitable appeal or a legal writ of error.[67] The former could be solved by the formula that a party must have, as a right, "a trial by jury of all issues which, according to the recognized distinctions between actions at common law and suits in equity, are determinable in that mode."[68] The solution of the other difficulty would be to look to the nature of the main proceedings in the course of which legal or equitable claims were interposed.[69]

The year after these amendments were framed New Jersey passed a law which was a substantial equivalent of the Association's bill.[70] The following year the United States Supreme Court adopted equity rules[71] which accomplished the reforms sought so far as the equity side was concerned. Two years later Congress passed the Association's bill and it became law on March 3, 1915.[72]

Proof in the Appellate Court

In the pursuance of the general principle that all questions of fact should be disposed of finally on one trial, Dean Pound in his report to the Association in 1910 laid down the rule that

> Any court to which the cause is taken on appeal should have the power to take additional evidence by affidavit, deposition or reference to a master for the purpose of maintaining a verdict or judgment whenever the error complained of is lack of proof of some matter capable of proof by record or other incontrovertible evidence, defective certification or failure to lay the proper foundation for evidence which can, in fact, without involving some questions for a jury be shown to be competent.[73]

An English rule of court apparently was the model from which this principle was drawn.[74] In 1913, Massachusetts, expressly stating that it was acting on the principle adopted by the American Bar Association, passed a statute giving substantial effect to it.[75] The New Jersey Practice Act also embodies it.[76] In 1916 the Association's influence procured an amendment to the judicial code allowing the appellate court to take testimony in equity cases where the interests of justice require it.[77] It is impossible to know whether the Slocum Case would be construed as forbidding this being done on the law side in Federal courts. On principle it seems clear it should not be. The states will probably fall in line with it.[78]

Reversal for Technical Errors

One of the evils most condemned in American practice is the disposition to dispose of appeals or writs of error upon technical grounds and not decide them on their merits. To cure this the Association drafted the following bill.[79]

> No judgment shall be set aside, or new trial granted, by any court of the United States on the ground of misdirections of the jury. or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which the application is made, after an examination or the entire cause it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

Later the word "affirmatively" was stricken out. This bill was in accord with the early American rule.[80] That rule had been changed by the English Court of Exchequer about 1831 which declared that a new trial should be granted if the error found by the appellate court could possibly have affected the verdict.[81] The objections urged against this rule were, among others, that there was no likelihood that, on a second trial the real merits of the case would be ascertained more clearly than on the first, but the contrary. Nor, in America, is there any constitutional right to two trials by jury.[82] The Exchequer rule worked badly and was changed by rule of court in England.[83]

The Association constantly urged upon Congress the adoption of its bill. In 1909 President Taft recommended it to Congress in his annual message on request of the Association.[84] In 1911 it passed the House unanimously, but didn't get out of committee in the Senate.[85] The work of the Association was reflected in some of the decisions of courts and also in state legislation which had been passed embodying the measure.[86] In 1913 the Supreme Court altered the equity rule[87] controlling the matter so as to do for equity procedure what the proposed bill would do at law. In this year, also, Massachusetts expressly giving credit to the Association's recommendation, enacted a provision substantially carrying out the purpose of the law

60. *Metcalf* v. *Gilmore*, 59 N. H. 417, 422. The court held that the fact that the Statute of Jeofails allowed amendments at law and amendments were always allowed in equity, coupled with the union of legal and equitable powers in one court, was sufficient, without legislative enactment.
61. 36 A. B. A. R. 476. (1911).
62. 36 A. B. A. R. 476. (1911).
63. Schurmeyer v. Life Ins. Co., 171 Fed. 1; affd., 171 Fed. 7. The plaintiff sought relief in an action at law which could only be granted in a suit in equity. This was finally decided by the circuit court of appeals and the case was remanded. Amidon, J., in the circuit court, made an order directing the plaintiff to transform his complaint at law into a bill in equity and directed that the cause be transferred to the equity docket there to be proceeded with the same as if it had been originally brought as a suit in equity.
64. Chap. 20, §§ 19, 21.
65. I Stat. at L., 276, § 26.
66. 36 A. B. A. R. 476. (1911).
67. 36 A. B. A. R. 479. (1911).
68. Black v. Johnson, 177 U. S. 349, 364.
69. 36 A. B. A. R. 479. (1911).
70. Laws of 1912, Chap. 223. See 37 A. B. A. R. 560. (1912).
71. Rules 22, 30. See 38 A. B. A. R. 549. (1913).
72. 38 U. S. Stat. 956. See 40 A. B. A. R. 510. (1915).
73. 25 A. B. A. R. 645. (1910).
74. Ord. 58, Rule 4.
75. Laws of Mass., 1913, Chap. 716, § 3.
76. N. J. Practice Act, 1912, § 28.
77. Jud. Code, 27. See 2 A. B. A. J. 611. (1916).
78. 38 A. B. A. R. 549. (1913).
79. 33 A. B. A. R. 33, 550. (1908).
80. This rule is stated by Marshall in Church v. Hubbard, 2 Cranch, 232.
81. Crease v. Barrett, 1 Cr., M. & R. 922; also Baron de Rutzen v. Farr, 4 Add. & El., 53. (1835).
82. 41 A. B. A. R. 541. (1916).
83. Ord. 39, Rule 6. The wording of the Association's bill was copied after this rule.
84. 5 A. B. A. J. 455. (1919).
85. 36 A. B. A. R. 466. (1911).
86. 36 A. B. A. R. 453-5. (1911).
87. Rule 19.

being urged on Congress.[88] New York had passed a law to the same effect the preceding year.[89] In 1916 a brief was carefully prepared and submitted in the House and a copy sent to each senator.[90] The long-urged amendment was finally adopted Feb. 26, 1919.[91] It was altered from the original bill of the Association, but if liberally construed effects a very substantial improvement.[92]

Jury Trial

Although in the United States Constitution and in the state constitutions there are provisions safeguarding trial by jury in civil causes, there have been strong attacks made, not only upon particular features of the system, but upon the institution as a whole. It first came to the attention of the Association through the report of a committee on delay in judicial administration of which David Dudley Field was chairman. This report, basing its conclusions upon answers given in questionnaires which had been sent out, criticized the jury system severely because of the cost, the delay, and the uncertainty it entailed.[93] In explaining its popularity the report said:

> They love the jury system because this mode of trial is a negative upon the execution of laws in what are deemed to be hard cases; because it is a sort of pardoning power, where twelve men, in violation of their oaths, may render a verdict against the law and the evidence."[94]

Five years later another committee of the Association declared that "Trial by jury is itself on trial at the bar of public opinion."[95]

Supporters of the institution were not lacking. Even the severe stricture by Field's committee was tempered by an admission that it generally leads to just verdicts when held before competent judges.[96] Joseph Choate, in a classic defense of trial by jury, insisted that the alleged evils arose out of the procedure surrounding it and the laws cutting down the power of judges to aid it.[97]

Out of this early antagonism in the Association to the civil jury came several suggestions for improving, without destroying it. It was recommended that greater care should be taken to put men of better calibre on the jury list; that a jury should not be called unless demanded by one of the parties; that the power of the judge to help the jury should be increased; and that the method of controlling the jury's action by special interrogatories and other devices should be extended.[98]

(*a*) *The Unanimity Rule*

One particular cause for dissatisfaction with the jury system was the great number of disagreements by juries.[99] If the unanimity rule were discarded, it was believed most of these would be abolished by eliminating the man who had been approached and the stubborn man of oblique perceptions on so many juries who can never see things as others do. A committee report advocated that the Association support such a movement, but after a brief discussion the report was not adopted.[100]

(*b*) *Right of the Judge to Assist the Jury*

Since trial by jury is trial by jury as it existed at the adoption of the Constitution it would seem that the duties and functions of the judge in its workings should be as "inviolate" as those of the jury. Nevertheless, laws curtailing the powers of the judge to aid the jury by his charging, his summing up, and his comments were frequent in the states.[101] Field's committee in 1886 noted them and recommended taking off the restrictions which had been imposed, and giving the trial judge greater latitude in guiding the jury to a just result.

One type of these laws prohibit judges from charging or commenting on any matters of fact.[102] These statutes are often ambiguous and apparently do not prevent summing up by the judge.[103] Even so, their effect is bad. Inability of the judge to express his opinion strengthens the power of the ablest counsel and weakens that of the inexperienced attorney who is inadept in presenting his case. The judge should be more than a referee; he should be able to exert his ability in seeing that justice is done in each case. To prevent him doing so "is as though we should drive all the architects and builders into exile and construct wigwams for ourselves."[104] In 1916 a bill was submitted in Congress providing that federal judges should not be allowed to express any opinion on the facts or make any comment on the weight of the evidence.[105] It was opposed by the Association through committee,[106] and failed to become law.[107]

In 1918 another bill with a similar provision was proposed, fought by the Association and, as a result, never was brought to vote.[108]

Another type of statute abridging the prerogatives of the judge requires that charges to the jury must be reduced to writing. Its purpose was to enable counsel to get a fair bill of exceptions and came into vogue before the advent of the court stenographer.[109] There seems to be no necessity for it now and there are serious objections. It has been held that the legislature cannot require the state supreme court to write opinions,[110] or prepare headnotes for the reporter.[111] If the legislature cannot impose these duties, it is difficult to see by what authority it can exact the writing out of instructions." There is an additional practical objection that a read instruction does not "sink in." In 1918 a bill was proposed in Congress which required the judge's charge to be reduced to writing

88. Laws of Mass., 1913, Chap. 716, § 1. See 38 A. B. A. R. 549, 573. (1913).
89. Laws of 1912, Chap. 280.
90. 2 A. B. A. J. 606. (1916).
91. Jud. Code § 269. For a discussion of this amendment, see Progress of the Law, Civil Procedure. 33 Harv. L. Rev. 250. As enacted it reads: "On the hearing of any appeal, *certiorari*, writ of error, or motion for a new trial in any case, civil or criminal, the court shall give judgment, after an examination of the entire record before the court, without regard to technical errors or defects or to exceptions which do not affect the substantial rights of the parties."
92. 5 A. B. A. J. 455. (1919).
93. 9 A. B. A. R. 336. (1886). "As the best tribunal for the trial of civil causes indiscriminately it is now indefensible." *Ibid.* 345.
94. 9 A. B. A. R. 338. (1886).
95. 14 A. B. A. R. 281. (1891).
96. 9 A. B. A. R. 339. (1886).
97. 21 A. B. A. R. 303. (1898).
98. 9 A. B. A. R. 344. (1886).
99. 12 A. B. A. R. 287. (1889).
100. 14 A. B. A. R. 48, 281. (1891). A minority report opposed this change on the ground that a divided verdict would not carry as much conviction of its truth as the unanimous verdict does. *Ibid.* 292. Some years later, Joseph Choate declared that there were very few mistrials because of jury disagreements; that there was a danger of hasty and unjust verdicts if the rule were departed from; and that there is no discontent with the rule among the litigants themselves. 21 A. B. A. R. 285. (1898).
101. Henry B. Brown, *Judicial Independence.* 12 A. B. A. R. 273. (1889).
102. 12 A. B. A. R. 274. (1889).
103. 12 A. B. A. R. 274. (1889).
104. Senator George A. Sutherland's address to the Association. 37 A. B. A. R. 286. (1912).
105. 41 A. B. A. R. 541. (1916); 2 A. B. A. J. 607. (1916).
106. The Association's committee prepared a brief against the bill which cited cases which set forth the advantage of having a judge and jury acting together. These cases were: Carver v. Jackson, 4 Pet. (U. S.) 80; Games v. Stiles, 14 Pet. (U. S.) 327.
107. 42 A. B. A. R. 235. (1917).
108. 4 A. B. A. J. 501. (1918). 5 A. B. A. J. 458. (1919).
109. 9 A. B. A. R. 341. (1886).
110. Houston v. Williams, 13 Calif. 24; Bullett v. McGur, 14 Colo. 577; Vaughan v. Hart, 49 Ariz. 160.
111. Ex parte Griffiths, 116 Ind. 83; Matter of Head-Notes to Opinions, 48 Mich. 641.

on request by either party.[112] Opposition by the Association was a big factor in killing it.[113]

A third species of these statutes require the judge to give only such instructions as are submitted to him by counsel, either with or without modification.[114] This practice tends to confuse the jury by submitting the question to it on disconnected, often repeated, propositions of law. Still a different statute is the one proposed in Congress in 1918 to compel the judge to deliver his charge to the jury after the introduction of testimony and before the argument of counsel on either side.[115] The disadvantages of such a practice are obvious. The influence of the Association prevented the bill from being pressed.[116]

(c) *Special Findings by the Jury*

It frequently happens that a party will go to trial, open to the jury, and then the objection will be raised that, admitting all allegations, he is not entitled to judgment. The court so finds and the case is dismissed. The party appeals, and the upper court reverses the decision of the lower court and sends the case back for trial. Now, however, the party's witnesses are scattered and his position is much weaker. Other situations, similar to this, cause the same sort of injustice, particularly where the case goes to the jury and the jury's verdict is set aside. A remedy was early suggested by David Dudley Field in a more extended practice of putting special interrogatories to the jury on the controlling facts in issue.[117] The question raised at that time was whether counsel should be allowed to compel the court to put any number of questions to the jury. It was cogently pointed out that this would open the door to abuse in that it might encourage counsel to try to trap the jury.[118] The matter did not get beyond the talking stage until 1908, when an act was drafted by the Association which provided in substance that the trial judge should submit any questions of fact arising on the pleadings to the jury, reserving any questions of law for the decision of the court, with power in both the trial court and appellate court to enter judgment according to the law of the case.[119]

Objection was immediately raised that this would impair trial by jury. Two answers were given. One was that it gave more sanctity to the jury trial to have it ordinarily final by letting the questions of fact be decided for once and all.[120] The other answer was the historical one that this was the original theory upon which trial by jury was framed.[121]

The Association's advocacy of the bill was reflected in both state legislation[122] and judicial decision.[123] The bill was twice passed by House, but never got out of committee in the Senate.[124] The Judicial Code was passed without it, but the bill was continued with a view to amending the Code. 269.

In 1913 the Slocum Case[125] was decided. In that case a Pennsylvania statute allowed the evidence to be made part of the record and permitted the appellate court to enter judgment on the whole record *non obstante veredicto*. The Supreme Court held that this violated the Seventh Amendment and ordered a new trial. The case was harshly criticized in the Association. It appeared that the constitutional point had not been made in the record or argued by either side.[126] The Association, as *amicus curiae* had asked for a rehearing on the constitutional point, and had been refused. The Pennsylvania statute, though intended to accomplish the same end as the Association's bill was, of course, easily distinguished. The committee on the subject in its report said:

> It seems hardly possible in view of the numerous authorities cited in the brief for the rehearing, and many others which might have been furnished, notably Treacher v. Hinton, 4B. & Ald. 413, 416, that the Supreme Court would hold that at common law the practice did not prevail of reserving on the trial of a case before a jury, questions of law for the consideration of the full court or any appellate court to which the case might be removed on writ or error, and that at common law the court had power in *banc* to render final judgment upon the law on the points so reserved. We are bound to infer that the denial of the motion means that the Supreme Court is of opinion this is the correct distinction and that the reform which your Association has advocated may thus be sustained in the federal practice.[127]

In spite of the belief that the Association's bill would be upheld, no headway has been made with it.[128] It has not been mentioned since 1915.

Reform of Federal Procedure

(a) *Equity Practice*

The federal equity rules were originally adopted in 1822, revised in 1842, and amended since. Where the express rules failed to meet the exigencies of the case the principle was stated that the federal equity practice should be regulated by the practice in the High Court of Chancery in England so far as applicable to local conditions.[129] The Judicature Act abolished the rules of the High Court of Chancery. So far, therefore, as the enacted rules didn't cover the subject, an obsolete system was the source of equity procedure. A lawyer wanting to practice in the federal equity courts must "make himself acquainted with Chancery practice in England as it existed prior to 1873, as that practice has been modified by rules of the Supreme Court adopted from time to time, as these rules may be construed and applied in the particular case by a federal judge whose training has most likely been exclusively in the state courts and under the Reformed Procedure, and who may comprise within his territorial jurisdiction states which retain the common law practice, those which use code practice, and those using practice acts supplemented by rules."[130] Federal equity practice was a sealed book to the average practitioner. In spite of this picture the system was considered satisfactory.[131] Just what part the Association played in the drafting of the new equity rules it is difficult to determine. In 1917 the committee in charge of the subject gave a list of changes made in the rules which had been advocated by the Association and said that the reformulation of these rules was made after conference with the Association's committee.[132] The requirement of following the old English chancery practice had been abro-

112. 4 A. B. A. J. 501. (1918).
113. 5 A. B. A. J. 458. (1919).
114. Code of Ala., § 2756.
115. 4 A. B. A. J. 501. (1918).
116. 5 A. B. A. J. 458. (1919).
117. 9 A. B. A. R. 343. (1886).
118. 12 A. B. A. R. 272. (1889).
119. 33 A. B. A. R. 545. (1908).
120. 34 A. B. A. R. 583. (1909).
121. 34 A. B. A. R. 583. (1909).
122. 35 A. B. A. R. 616. (1910); 38 A. B. A. R. 549, 573, (1913).
123. 34 A. B. A. R. 66. (1909).
124. 36 A. B. A. R. 459. (1911); 39 A. B. A. R. 576. (1914).
125. Slocum v. New York Life Ins. Co., 228 U. S. 364.
126. 38 A. B. A. R. 561. (1913).
127. 38 A. B. A. R. 565. (1913).
128. 39 A. B. A. R. 576. (1914); 40 A. B. A. R. 516 (1915).
129. Rules of the Supreme Court, in Equity. Rule 81. See 21 A. B. A. R. 454. (1898).
130. 21 A. B. A. R. 454. (1898).
131. 42 A. B. A. R. 337. (1917).
132. 9 A. B. A. R. 503. (1886).

gated.[133] On the whole, the revised rules of equity practice seem to work well.[134]

(b) Common Law

The rule that on the common law side the federal courts must conform to the state practice "as near as may be."[135] gave rise to discussion in the Association so far back as 1887.[136] The merit of the practice was that a lawyer in any state might bring a common law cause in the federal court in his state about as easily and with little more special preparation than in his state court.[137] If, however, he wished to bring a common law suit in another district outside his state he was absolutely dependent on the assistance of local counsel.[138] Moreover, at that time, the circuit judge who held court in four or five states had to learn as many different systems of procedure and take judicial notice of the statutes of each district.[139] It was felt so unsatisfactory that remedies were proposed by the Association. David Dudley Field introduced a resolution that a federal code of procedure be prepared.[140] Another proposal was that the equity rules, somewhat modified, and with a provision safeguarding jury trials should be adopted in the common law cases.[141] Field's resolution was passed unanimously.[142] A few year's experience, however, served to convince the Association that there was no hope of getting through any civil code of procedure, so it was dropped.[143] Three years later, in 1895, another movement toward uniform procedure was started.[144] A committee reported, and after pointing out the defects of the present practice advocated the English rules of court system. [145] This committee did not recommend that this practice be adopted, but only that Congress be urged to pass a bill providing for a commission to study different procedural systems and draft and present to Congress the plan which would produce the best result. This recommendation was voted against.[146] Two years later a similar proposal was defeated.[147] The matter was not mentioned again for fourteen years.

In 1912 a resolution was adopted that a uniform system of law should prevail in both the federal and state courts and that the way to accomplish this was to have a model federal system for the states to copy.[148] In pursuance of this resolution a special committee was created and an act was drafted and introduced in Congress giving the Supreme Court substantially the same powers to make rules of procedure on the law aside as it now has on the equity side.[149] The committee has vigorously prosecuted the campaign for the adoption of this reform.[150] Among other things it has prepared a brief history of the origin and evolution of the present federal practice,[151] it has analyzed and answered the objections to the proposed bill,[152] it has listed benefits to be expected from the change,[153] it has enlisted the aid of state bar associations,[154] and it has organized a militant campaign to bring pressure to bear on the committee on the Judiciary in the Senate to have the bill reported.[155] It seems probable it will pass if it can be got out of committee.[156]

133. 42 A. B. A. R. 336. (1917).
134. See Lane, Working under Federal Equity Rules, 29 Harv. L. Rev. 55.
135. Rev. Stat. § 914.
136. 10 A. B. A. R. 317. (1887).
137. 10 A. B. A. R. 317. (1887).
138. 10 A. B. A. R. 317. (1887).
139. 10 A. B. A. R. 317. (1887).
140. 9 A. B. A. R. 551. (1886).
141. 9 A. B. A. R. 503. (1886); 11 A. B. A. R. 63. (1888).
142. 10 A. B. A. R. 317. (1887); 11 A. B. A. R. 79. (1888).
143. 15 A. B. A. R. 7, 313. (1892).
144. 18 A. B. A. R. 33. (1895).
145. 19 A. B. A. R. 421. (1896).
146. 19 A. B. A. R. 47. (1896).
147. 21 A. B. A. R. 33. (1898).
148. 37 A. B. A. R. 35. (1912).
149. 37 A. B. A. R. 35. (1912); for a statement of the bill, see 5 A. B. A. J. 475. (1919).
150. For a detailed chronological statement of the efforts of the committee to get the bill enacted, see 5 A. B. A. J. 476. (1919); 6 A. B. A. J. 519. (1920).
151. 5 A. B. A. J. 471. (1919).
152. 5 A. B. A. J. 472. (1919).
153. 5 A. B. A. J. 473. (1919).
154. 6 A. B. A. J. 512 (1920).
155. 6 A. B. A. J. 405, 509. (1920).
156. 6 A. B. A. J. 509-512. (1920).

Necrology

Edward Pierce Allen

Edward Pierce Allen, member of the American Bar Association and also a member of the American Bar in China, died on February 9, 1921, at Pekin, China. At a recent session of the United States Court for China a Memorial to his worth as a lawyer and as an American citizen was spread on the records.

Mr. Allen was born in China on February 19, 1866, and was the son of Young J. Allen, one of the oldest and most prominent missionaries in that country. He was educated in the United States, rounding out his academic career with a course at Johns Hopkins University. He practised law in the United States for a short time, but returned to China as a young man to follow his profession there. He located for a short time at Shanghai, and later removed to Tientsin, where he practiced until the time of his death, a period of about twenty years.

Having learned the Chinese language as a child, and having continued the study of that language throughout his life, he had the great advantage over other foreigners of direct communication with the people with whom he came in contact. This, together with his western training, enabled him to render most valuable services to his clients. Speaking at the session of the United States Court for China at which the Memorial was presented, Judge Lobingier stated that he was but expressing the general opinion when he said that Mr. Allen was recognized as the foremost lawyer in North China.

Mr. Allen was a charter member of the Far Eastern American Bar Association and had been its Vice-President for North China and Japan for several years previous to his death. He was also a member of the American Bar Association and attended its meeting in Chicago in 1916 as a delegate from the Far Eastern American Bar Association. His interest in the work of the National Association was naturally heightened by the fact that his brother-in-law, the late George Whitelock, was for many years its Secretary.

"As a lawyer Mr. Allen had the highest standard of professional ethics." Judge Lobingier said on the occasion just mentioned: "In all the years I have known of him I have never heard the faintest suggestion of any questionable practice on his part, and he was especially noted for his fair and considerate attitude towards his opponents. * * * Mr. Allen had many interests outside of law. He was deeply versed in the lore of China, the land of his birth, and especially in its art, of which he was an ardent and successful collector."

In spite of his long residence abroad, his love of America was outstanding, and he never tired in his effort to develop and continue the friendly relations which had grown up between the American and Chinese people.

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

MEETING OF SECRETARIES

A meeting of the Secretaries of the various State Bar Associations will be held at the Hotel Sinton, Cincinnati, Ohio, at 12.30 p. m. on August 30, 1921, when an informal luncheon will be served. Thereafter the various subjects for discussion will be presented. The purpose of the meeting is to bring about a closer understanding and co-operation among the Secretaries of the State Bar Associations. The meeting has been called at the suggestion of Mr. R. Allan Stephens, Secretary of the Illinois State Bar Association, who so successfully arranged a similar conference in Chicago when the Association met there in 1916. The meeting will be held on the same day that the Conference of Delegates of State and Local Bar Associations meets, but it will be arranged so as to avoid any conflict with the sessions of that Conference. All State Bar Associations are urged to include their Secretaries among the delegates selected to attend the Conference so that as many of the Secretaries as possible may be present at the luncheon and meeting of the Secretaries of State Bar Associations.

ARKANSAS

The Bar Association of Arkansas will hold its twenty-fourth annual meeting at Hot Springs on June 2 and 3. Ex-Gov. Frank O. Lowden, of Illinois, has agreed to be present and deliver an address.

Mr. W. F. Coleman, President of the Association, will deliver an address on "The Crime Wave." Papers will also be read by former Chief Justice Joseph M. Hill, of Fort Smith, and former Governor J. M. Futrell, of Paragould. Further details of the program will be announced later.

CALIFORNIA

The California Bar Association, at its 1920 convention, recommended the adoption of several proposed statutes which had been formulated by its committees; and the legislature which has just adjourned has enacted most of the legislation thus indorsed. The success of the Association in this regard is largely due to the efforts of Mr. Perry Evans of the San Francisco bar, who presented and explained its views before the various legislative committees.

Among the measures advocated by the Association and adopted by the legislature with slight modifications is a series of statutes providing for declaratory relief. A new chapter has been added to the Code of Civil Procedure, which is quite similar in its language to the statutes recently adopted in other states, and which reads as follows:

> §1060. Any person interested under a deed, will or other written instrument, or under a contract, or who desires a declaration of his rights or duties with respect to another, or in respect to, in, over or upon property, or with respect to the natural channel of a water course, may, in cases of actual controversy, relating to the legal rights and duties of the respective parties, bring an action in the Superior Court for a declaration of his rights and duties in the premises, including a determination of any question of construction or validity arising under such instrument or contract. He may ask for a declaration of rights or duties either alone or with other relief; and the court may make a binding declaration of such rights or duties whether or not further relief is or could be claimed at the time. The declaration may be either affirmative or negative in form or effect, and such declaration shall have the force of a final judgment. Such declaration may be had before there has been any breach of the obligation in respect to which said declaration is sought.
>
> §1061. The court may refuse to exercise the power granted by this chapter in any case where its declaration or determination is not necessary or proper at the time under all the circumstances.
>
> §1062. The remedies provided by this chapter are cumulative, and shall not be construed as restricting any remedy, provisional or otherwise, provided by law for the benefit of any party to such action; and no judgment under this chapter shall preclude any party from obtaining additional relief based upon the same facts.

In addition, the code provisions allowing the maintenance of a suit to determine adverse claims to real property were amended so as to apply to personal property as well; and it was provided that an action might be brought "for the purpose of having declared the existence or nonexistence between the parties of the relation of parent and child, by birth or adoption."

Other bills were adopted simplifying details of procedure, among them one which dispenses with the necessity of the joinder of a husband in a suit brought by or against a married woman.

The Bar Association also secured the passage of an act defining the unlawful practice of law and providing for its punishment. Although the act was similar in its terms to the New York statute upon the subject, it was vigorously opposed by various organizations of banks and trust companies, some of whom had been engaged in advertising their willingness to furnish legal services in a manner which brought the subject to the attention of the Bar Association. However, the bill passed both houses of the legislature and is now before the governor for approval.

In addition to its activity before the legislature, the Bar Association joined with business and commercial organizations in condemning the proposed amendment to the community property law, which came before the people of the State upon referendum proceedings last November. This measure had been carelessly drawn and its passage would have seriously affected titles to property and would have inconvenienced the public in the transaction of business. It was defeated by an enormous majority.

FLORIDA

The annual convention of the Florida State Bar Association, held in Jacksonville March 28 and 29, adopted for proposal to the Legislature a Bill providing for the organization of the State Bar and regulating the practice of law. As originally reported to the convention by the Executive Committee, it provided for the incorporation of the State Bar. But because of various constitutional and other objections, it was finally decided to eliminate the incorporation feature.

The Bill provides that all attorneys of the State shall be members of the State Bar, and shall be subject to all of the requirements and provisions of the Act. The State Bar shall be governed by a Board of Governors, composed of nine members, to be appointed by the Governor of the State from the members of the State Bar in good standing. In making such appointments the Governor shall take into consideration the recommendation of a majority of the members, but this recommendation shall not be binding. Provision is made for an advisory nomination election to ascertain the sense of the Bar on this point. The terms of the Board of Governors shall be three years. It shall select a Secretary and recommend to the Governor a suitable person as Treasurer. It may also provide for such committees as it deems expedient for carrying out the purposes of the act.

The Board shall act on all applications for membership; receive complaints against members; make reports and recommendations to the State Bar at the annual meeting, and to the Supreme Court of the State, on matters pertaining to the administration of justice; shall report to the Governor and the Attorney-General annually the condition of litigated business in each of the judicial circuits of the State.

With the approval of the Supreme Court the Board shall have power to formulate rules of professional conduct for all members of the bar. It shall determine the qualifications for admission to practice law, examine the candidates, and recommend those fit to the Supreme Court. The Board is also charged with instituting disbarment proceedings, where they appear to be justified, in the name of the State of Florida in the proper circuit court. The authority when given, however, is not to be taken as interfering with the present right of Judges to order the institution of disbarment proceedings in proper cases.

The necessary expenses of the Board in the discharge of this and other duties are to be defrayed out of a fund provided for the purpose. The Bill provides for an annual license fee or tax of $25 for each member. Of this amount the Treasurer shall retain $10 as a State license tax, shall pay to the County Treasurer of the member's residence $5 as a county tax, and shall transmit to the Board of Governors $10 to be used for the proper administration of the act.

Another matter of interest to State Bar Associations which was passed upon at the convention was the selection of the Jacksonville Public Library as the official depository of the records and documents of the State Bar Association. The Jacksonville Public Library will also act as the distributing agency for the minutes and printed copies of the proceedings of the Association. It will also exchange copies of the proceedings with the proceedings of the meetings of other Bar Associations in the country.

Following are the officers elected at the recent meeting. President—Judge C. O. Andrews, Seventeenth judicial circuit, Orlando.

Vice-Presidents—S. Castro, First Judicial circuit, Pensacola; F. B. Winthrop, Second, Tallahassee; J. B. Johnson, Third, Live Oak; G. C. Bedell, Fourth, Jacksonville; R. L. Anderson, Fifth, Ocala; J. Singleton, Sixth, Bradentown; G. A. DeCottes, Seventh, Sanford; W. H. Hampton, Eighth, Gainesville; W. S. Phillips, Ninth, Quincy; J. J. Swearingen, Tenth, Bartow; C. D. Bowen, Eleventh, Miami; R. A. Henderson, Twelfth, Fort Myers; W. A. Carter, Thirteenth, Tampa; Paul Carter, Fourteenth, Marianna; W. Metcalf, Fifteenth, West Palm Beach; B. R. Riles, Seventeenth, Orlando.

Secretary—Herman Ulmer, Jacksonville; Treasurer—Phil. May, Jacksonville; Executive Council—Judges O. K. Reaves, Sixth Judicial circuit, Bradentown; Judge W. H. Ellis, State Supreme Court, Tallahassee; W. A. MacWilliams, St. Augustine; Armstead Brown, Miami.

GEORGIA

It is announced that Senator William E. Borah will deliver the annual address at the meeting of the Georgia Bar Association, to be held at Tybee Island June 2, 3, and 4. President A. R. Lawton, of Savannah, will deliver the presidential address. The following additional addresses are on the program: "The History of Georgia as Recorded in the Reports of the Georgia Bar Association," by Orville A. Park, of Macon; "The Tendencies of the Times; Are We Going Forward or Backward?" by Reuben R. Arnold, of Atlanta; "Public Utility Regulation in Georgia," by C. Murphey Candler, Chairman of the Railroad Commission of Georgia; "Taxation," by Benj. E. Pierce, of Augusta; "The Bench as a School of Law," by A. B. Lovett, of Savannah; "The Frontiersman in the Field of Early Legislation," by A. L. Henson, of Calhoun, State Commander of the American Legion; "Sunday Legislation," by Robt. M. Arnold, of Columbus.

ILLINOIS

The Board of Governors of the Illinois State Bar Association met at the University Club, Chicago, April 16. Among the most important matters passed on was the adoption of the amendment to the by-laws providing for election of all officers by mail. Heretofore officers of the Association have been elected by those who attended the annual meetings, nominations having been made by petition at least thirty days before meeting. Hereafter nomination will be made at least thirty days before the annual meeting, and ten days before such meeting the secretary will mail each member of the Association an official ballot, the same to be returned to the tellers by mail before 5 p. m. of the first day of the annual meeting. It is hoped that this method of the election will go a long way to removing the criticism of clique control so frequently aimed at the State Bar Associations.

Another item of importance passed on by the Board was the matter of increasing the number of the Board by seven, one to be elected by the Federation of Local Bar Associations in each Supreme Judicial District at the annual meeting. As this matter involves a change of the articles of incorporation, the Board of Governors simply approved the proposition

and directed a committee to take necessary steps to secure the amendment of the articles.

The Committee on Fees and Schedule of Charges recently sent out a questionnaire to the members with the view of finding out whether there should be any change in the schedule adopted by the Association at the last annual meeting. At the present time the committee is having these reports tabulated with the view of making proper recommendation at the coming annual meeting.

The Committee on Office Management has been doing a large amount of detail work and the final report promises to be one of great value to the practicing attorney.

The annual meeting of the Association will be held at Dixon, June 9, 10 and 11.

INDIANA

The Indiana State Bar Association has the unique distinction of being publicly commended by resolution of the General Assembly of that State for its efforts in codifying and revising the statutes governing the organization of corporations for profit, and being requested by the legislative body to undertake similar work with respect to the insurance and other laws.

Several years ago the Indiana Bar Association appointed a special committee to draft a proposed revision of the corporation laws. This committee, after much time and study, formulated a bill governing corporations for profit, which was approved by the Association and introduced in the General Assembly. This bill having failed of passage at two preceding sessions of the legislature, it was re-introduced at the session of 1921, and after hearings had been held upon the matter it was enacted without a single dissenting vote. The General Assembly thereupon adopted a resolution publicly thanking the Association for its public service and requesting that it undertake similar work relative to the insurance laws and other special lines.

Acting under that suggestion the officers of the Association, in conjunction with the Governor and Attorney General of the State, are at present attempting to work out a plan by which the Association may undertake, with the aid of the State, a revision or codification of the statutes, in whole or in part, (the extent of the work to be undertaken depending upon the plan which can be worked out and the funds which can be made available for that purpose) so that the same may be presented for approval at the next session of the General Assembly in 1923. The last authorized statutory revision was made in 1881, and the statutory law has since become so voluminous and confusing that there is a crying need for another general revision. Believing that the proper way in which to put a bar association on the map is by the rendition of effective public service, the Indiana Bar Association hopes to be able to perform that service.

MICHIGAN

The Legislature has failed to pass the bill to define what is the practice of law and to provide a penalty for practice by laymen. This bill was prepared by a committee at the last annual meeting of the State Bar Association. It has passed a measure providing for the codification of the entire corporation laws. This was prepared by the Attorney General's Department, but had the sanction of the State Bar Association.

A bill has been introduced "To advance the science of jurisprudence, to promote reform in the law, to facilitate and improve the administration of justice, to uphold the integrity, honor and courtesy of the members of the legal profession and to provide for the government of the Bar of Michigan." This is a new venture and the probability is that it will not pass at this session, but it will at any rate give the idea a start.

Under the proposed measure all attorneys at law are declared to be officers of the Supreme Court and of the various inferior courts of record of the State, and, as such, members of the State Bar and subject to the requirements and provisions of the act. A Board of Directors of the State Bar is established, consisting of two members resident in each judicial circuit, who shall hold office six years and be elected by members of the State Bar by ballot. This Board, among other things, is empowered to investigate all complaints that may be made concerning the unprofessional conduct or want of good moral character of any member of the Bar. In all cases involving unprofessional conduct, it may take disciplinary action by public or private reprimand, suspension from the practice of law or disbarment. In cases involving alleged want of good moral character, it shall only have power to recommend to the Supreme Court what action shall be taken.

The Supreme Court may, in any case of discipline, suspension or disbarment, review the action of the Board and, on its own motion and without certification of any record, inquire into the merits of the case and take such action as it deems proper. Nothing in the act is to be construed as limiting or modifying in any way the powers of the Supreme Court and various inferior courts in regard to such matters.

The Board of Directors shall have power to make rules governing procedure in cases involving alleged misconduct of members of the State Bar and may create committees for the purpose of investigating complaints and charges. The Board or such committee may designate any Justice of the Peace or Notary Public to take testimony under oath in any such investigation. The Board and any Committee appointed for that purpose shall have power to subpoena and examine witnesses and compel their attendance and the production of books, papers, etc. All witnesses are to be paid the same fees and mileage as are paid in cases pending in the Circuit Court.

Provision is made for a license fee to create a fund to carry out the purposes of the act, to be disbursed by the State Treasurer on order of the Board of Directors.

The annual meeting will be held at Flint, June 3 and 4. The program will be announced later.

MINNESOTA

The next meeting of the Minnesota Bar Association will be held at Duluth on July 26, 27 and 28.

NORTH DAKOTA

At the annual meeting of the Bar Association held in August, 1920, an interesting discussion was

had over a proposed incorporation of the Bar Association somewhat similar to the Law Societies in Canada. The proposed act was sponsored by John E. Greene, the secretary of the Association, and comprehended the assumption by the Bar Association, when so incorporated pursuant to legislative act, of both the admission, supervision and disciplining of lawyers, including their compulsory membership in the Association.

It is interesting to note that at least the nucleus of this idea has become now incorporated in a Legislative Act. At the recent session of the Legislative Assembly, through the activities of Theodore Koffel, a former president of the Association, an act was adopted which provides as follows: It creates a Bar Association of the State of North Dakota; it automatically makes as members thereof, with full privileges as such, all licensed practicing attorneys; it permits the adoption of a constitution, by-laws and rules for its government to be determined at its regular meetings; it provides for the payment out of the State Bar fund of a sum of money not to exceed $3 per member annually for the purpose of paying for the printing and distribution of its annual report, proceedings and other expenses in connection with its meetings. (S. B. 145 Laws 1921.)

In this connection it is necessary to state that in 1919 the Legislative Assembly created a State Bar Board (amending a previous law), consisting of three persons learned in the law, to be appointed by the Governor. The act gave to this Board the power and duty, theretofore possessed by a similar board under the old law, to hold examinations for the admission of applicants to the Bar and to make recommendations thereon to the Supreme Court, vested by law with the power of admission to the Bar. It provides for investigation of the conduct of attorneys, proceedings and prosecutions in disbarment by such Board under the directions of the Supreme Court. It requires every practicing attorney in the state to pay an annual license fee of $15 into a State Bar Fund, out of which are paid the expenses and fees of the State Bar Board.

The recent act initiates a new status for the Bar Association, recognized legally by the Sovereign power. It brings within the folds of the Association every practicing attorney without the payment of any fees or dues. It provides, in a measure, needed funds for the activities of the Association. At least it serves as a stepping stone for increased interest and ability to act among the entire legal profession of the State and may lead to a larger co-operative functioning of the lawyer in promoting the well being of his profession.

H. A. BRONSON,
Vice-Pres. of the American Bar Assoc. for N. Dak.
Bismarck, N. D.

SOUTH DAKOTA

August 3 and 4 have been announced as the dates for the annual meeting of the South Dakota Bar Association, which will be held this year in Watertown.

The chief speaker will be Mr. Robert W. Stewart, formerly of Pierre, later of Huron, and now Chairman of the Board of Directors of the Standard Oil Company of Indiana. Mr. Stewart is a resident of Chicago.

WEST VIRGINIA

The annual convention of the West Virginia Bar Association will be held at Charleston on July 28 and 29. The place and date were selected at a recent meeting of the Executive Board in Parkersburg.

Mr. Austin V. Woods was chosen acting Secretary of the Association, on account of the illness of Secretary Uriah Barnes of Charleston.

WISCONSIN

Owing to conflict with the Elks Carnival to be held at Chippewa Falls June 28 to July 4, and because of the probable congested condition of the hotels at that time, the date for holding the Annual Meeting has been changed to June 23, 24 and 25, 1921.

Headquarters will be the new Northern Hotel, recently completed. The Elks Club Rooms occupy the fifth floor of this hotel. The Association will probably have the use of these rooms for its business and social gatherings. This will be a very pleasant and convenient arrangement.

The Bill relating to retirement and annuities for Judges, now before the legislature, is backed by the State Bar Association on the ground of economy and efficiency in both Circuit and Supreme benches. It provides for the enforced retirement of Circuit Judges whose terms of office begin after October, 1921, at the age of seventy-five; and there has been introduced in the Senate a joint resolution amending Article 7 of the State Constitution to prohibit tenure beyond the age of seventy-five on the part of the Justices of the Supreme Court.

Under the terms of the proposed measure any Judge who has served continuously for twenty-five years and attained the age of seventy-five shall be entitled to an annuity of fifty per cent of his salary paid annually at the time of his retirement. A Judge who has served continuously eighteen years and attained the age of sixty-five shall be entitled to an annuity of forty per cent on retirement. One who has served continuously ten years and attained the age of fifty-five, and who has become incapacitated, is entitled to retire on thirty per cent of his salary. Any Judge now more than seventy-five years of age may retire by resignation at any time within one year after the passage of the act and on an annuity of fifty per cent of his salary.

Provision is made for satisfactory proofs of incapacity in the case of Judges who have attained the age of fifty-five years and have served continuously ten years, and who wish to retire on an annuity. The measure carries an annual appropriation from the general fund of such sums as may be necessary to carry its provisions into effect.

A Discouraging Contrast.

Dean Harlan L. Stone of the Law School of Columbia University asserts in his annual report, recently made public, that the indifference of the American Bar toward legal education seriously threatens the influence and usefulness of the profession in this country. Medical and legal education, according to him, afford a contrast discouraging to the law. While high standard American medical schools are drawing more students, high standard law schools are drawing less.

Book Review

The Law of Contracts, by Samuel Williston. New York, Baker, Voorhis & Co. 1920. In Four Volumes, pp. XXIII, 4182.

In the field of contract law there is no other person in America so well prepared by training and experience as Professor Williston to write a treatise such as this. The monumental work that he has produced is in every way worthy of him, and no law office should fail to have it available for constant reference. The first three volumes contain about 3,500 pages of text, the smaller fourth volume containing the index and table of cases.

The author includes in these volumes several subjects that are commonly dealt with in independent volumes. Among these are Agency, Sales, Bailments, Carriers, Suretyship, Negotiable Instruments, Specific Performance, Damages. These are included because they lie in the contract field and there is need for indicating that the broad fundamental principles of contract law are largely applicable throughout them all. Indeed, these principles can be constructed only by drawing from the decisions in all these fields. Special chapters are devoted to each of these subsidiary subjects in order to set forth the special doctrines applicable to each alone. It must not be supposed, however, that such subjects are treated in extreme detail or that the citations are exhaustive. The chapter on Sales of Personal Property is no substitute for the author's earlier treatise on that subject. The chapter on Bills of Exchange and Promissory Notes contains the Negotiable Instruments Law in full with comparatively brief commentary. The chapter on Suretyship forms an excellent text to go with Ames' Cases on that subject. This work may well be the starting point for determining the law of a case falling within any of the subsidiary contract fields.

The lawyer and the law student of today are overwhelmed by the great flood of books. We have as yet found no remedy for the vast number of reported cases. Each decision has its importance; for the decisions make the law. Doctrines once regarded as elementary and forever settled become questioned and denied and even obsolete. Few indeed are they who would be comptent to reduce the reports by excluding cases of little or no value. Such a censor would at once be a lawmaker.

It is possible, on the other hand, to raise a most effective dam against the flood of ill-constructed treatises. We need not buy them and their publication can be made unprofitable. This remedy, however, will not be a very effective one until the bar is reduced in numbers and greatly improved in quality and training. Until the leaders of the American Bar take vigorous action to make the profession a public service instead of a trade, we shall have ever poorer law books, ever greater confusion in the law, and ever greater injustice and social upheaval.

Professor Williston's work is not a mere ill-assorted digest. It is true he cites upwards of 40,000 cases, and the citations are accurate and in point; but the text is analytical and constructive throughout. At every step it shows the benefits of long comparative study and discussion and a sound practical judgment that will make a strong appeal to courts and practitioners. No doubt some legal scholars will have what seem to them to be important differences with this work in the matter of definition and analysis; this nevertheless is the best general reference book on the subject.

The present reviewer would like a legal analysis that more fully separates the operative facts of life from the legal relations that they create. He would like to have existing legal relations more closely defined and classified. He would like to have a legal terminology that expresses simple concepts of unvarying character instead of complex conceptions of variable content. It is by such means that we can reduce conflict and inconsistency; for faulty analysis and definition are in themselves a cause of litigation, of conflicting decisions, and of injustice. There will always be enough of conflict and uncertainty arising out of divergent interests and differing ideas as to public policy and general welfare.

Professor Williston's work should do much to dispel the fog that envelops the distinction between unilateral and bilateral contracts. No doubt more can still be done. He hesitates to declare that an offer may become irrevocable after the offeree has taken substantial steps in the process of accepting; but he sets out the decisions that tend in that direction. He hesitates to admit that a third party can acquire a *legal* right by assignment; but this makes little difference, inasmuch as the distinctions between "legal rights" and "equitable rights" are rapidly becoming ancient history.

There is a long and detailed discussion of Consideration. The author develops a definition and a theory from the cases; and he never lets his theory or his definition cause him to misrepresent the cases. He does not dodge a problem because it is difficult or avoid discussion because there is conflict.

The most difficult questions now arising in contract law are those connected with construction and performance, particularly in the case of continuing or instalment contracts. What is a condition precedent and how are we to recognize it? What is the effect of a non-performance by one party upon the duty of the other? When are promises dependent? When does a breach "go to the essence?" There is no quick and easy solution to which the lawyer can appeal, and any book that pretends to give such a solution is to be avoided. Every lawyer must give laborious days to the subject; he must possess both an accurate analysis and an accumulated experience in the actual decisions. Where conflict and uncertainty exist, he must recognize that fact and do the best he can for his clients in spite of it. He will be safe in accepting Professor Williston's analysis as sound; and the citations are ample to enable him to gain the case experience. A better and more complete discussion of these matters cannot be found elsewhere.

ARTHUR L. CORBIN.
Yale University School of Law

Better Education for Lawyers

Thoughtful members of the legal profession are becoming aware that the influence of the profession is waning and that at a time when the pre-eminence of lawyers is of prime importance in meeting the demands of a period of transition without impairing the foundation of our governmental system. One reason for this condition is undoubtedly the steady lowering of the average of academic education possessed by members of the bar.—Law Notes (March, 1921).

LETTERS FROM BAR ASSOCIATION MEMBERS

More About Gifts "In Contemplation of Death"

Boston, Mass., Mar. 28.—To the Editor: In your February issue appears an interesting letter of Mr. D. M. Kelleher of Fort Dodge, Iowa, discussing the suggestions contained in the editorial in your November number that the inclusion of completed transfers *inter vivos* in the gross estate of a decedent for the purpose of increasing federal estate tax might be unconstitutional.

Mr. Kelleher discusses the English practice and a number of the discussions in this country. He cites in his last paragraph the opinion of the Court of Appeals for the Sixth Circuit in Shwab v. Doyle. I do not find either in Mr. Kelleher's letter or in the opinion of the Court of Appeals in Shwab v. Doyle or any other opinion any discussion or reference to what seems to be the ultimate test of the constitutional question involved, and the failure to face this question fairly and fully seems to me, with all due respect, to render these opinions unconvincing. They beg the question whether a tax, the constitutional foundation of which is the privilege of transmitting property by death, can be stretched by a statutory definition to extend to the transfer of property which is completed and is not affected in the slightest degree by the fact of death.

It was suggested in your editorial that this attempt to extend the tax was really not an exercise of the power of taxing the privilege of transmission by death which is derived from or recognized by government, but was really an attempt to tax the death itself, which is a privilege granted by the Almighty and not dependent upon any government and is presumably, therefore, not taxable on any theory yet advanced. It may be conceded for the purpose of argument that congress might in its wisdom if it saw fit impose an excise or transfer tax on all gifts *inter vivos* if it were deemed expedient thus to penalize the generous impulses of men hitherto freely encouraged by the existence of the power of giving which, as suggested in your editorial, is "one of the best incidents of the institution of private property." Assuming that such a general tax on gifts might be sustainable, however unwise it might be, what reasonable ground is there for discriminating between gifts for the purpose of taxation on the basis of motive or presumed motive or presumed mixture of motive?

Mr. Kelleher states that Chief Justice White did not suggest in Knowlton v. Moore that the words "made in contemplation of death" were the equivalent of "gifts causa mortis." In order that the attention of the bar may be called to the exact language of Chief Justice White so that they may form their own opinion, I quote it as follows. He said, on page 65 of the opinion in 178 U. S. referring to the federal inheritance tax then under discussion:

> The tax is upon . . . any interest which may have been transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer to any person or persons, etc. That is to say, whilst the law places the duty on any legacy or distributive share passing by death, it puts a like burden on gifts which may have been made in contemplation of death and otherwise than by last will or testament.

Is it not clear from this passage that the phrase "in contemplation of death" was limited in the mind of the court to a transfer of interest, as therein referred to, made or intended to take effect in possession or enjoyment after the death? That seems the natural inference from this passage.

Mr. Kelleher refers to the English practice under the English statutes since 1850. Now, while of course it is true that the English practice in regard to taxation is interesting and suggestive, it does not follow that every form of taxation resorted to in England will necessarily pass the constitutional tests in this country. They have no written constitution in England and they have no restrictions on the parliamentary powers. A great many things have been done by the government in England which cannot be done here unless we abandon our system of constitutional law.

The question is whether congress or a state legislature can by a taxing statute first create by implication from the words "in contemplation of death" a legal theory or principle that every individual is under a duty as suggested in your editorial "to keep the gross value of his property at any particular time intact until his death without reducing it by gifts to individuals in order that the government may tax that property after his death," and having first established this rather extraordinary principle in this way, whether it can then by a definition and by arguments consisting of abusive epithets and statutory presumptions of evasive motive seize under the guise of a tax a portion of the property which the man has given away in the exercise of his constitutional right during his life.

In the case of Keeney v. N. Y. (222 U. S., 525) referred to by Mr. Kelleher, Mr. Justice Lamar stated that arbitrary discriminations could not be allowed. I submit that the discrimination for taxation purposes between gifts to individuals based merely upon motive or presumed motive of the kind just described is as arbitrary a proceeding as would be the old law school illustration of a poll tax on red-haired men.

Judge Holmes in Galveston R. R. Co. v. Texas (210 U. S., 227) said:

> Neither the state courts nor the legislatures by giving the tax a particular meaning or by the use of some form of words can take away their duty to consider its nature and effect.

Even in English practice the House of Lords decided in the case of the Duke of Richmond and Gordon, (L R 1909, A C 466) that the motive of the transfer was immaterial, and Lord Loreburn said:

> It is not my province either to censure or to commend the transaction. It was within the law and without dishonesty.

So, also, Lord Atkinson and Lord Collins agree, and Judge Holmes made a similar statement in Bullen v. Wisconsin (240 U. S. at page 630-31).

The case of Wright v. Blakeslee (101 U. S. 174), referred to by Mr. Kelleher, dealt with the "succession" of a remainderman upon the death of a life tenant under a will which took effect prior to the statute involved. No constitutional question was discussed and there appears to be no decision of the Supreme Court of the United States sustaining a tax on a completed transfer *inter vivos* where the entire beneficial interest including possession and enjoyment passes absolutely without reservation and without any postponement of interest of any kind.

Since in these cases, as stated in your editorial, the completed transaction owes nothing whatever to

the death to give it legal validity, and since the mere motive or desire of a donor that the donee should have the full value of the property given, as distinguished from a deliberate intent to reserve an interest in the donor or to postpone until death the absolute interest of the donee, is not a resasonable basis of discrimination between gifts for taxation purposes, I submit that the act of congress attempting to tax absolute gifts in this way is really a tax on death, which is not a taxable privilege and is, therefore, in the language of Chief Justice White, "an arbitrary and confiscatory excise bearing the guise of a tax" which calls for a remedy by inherent and fundamental principles for the protection of the individual.

The present tendencies of the government in this matter are indicated by the suggestions of the Secretary of the Treasury to the Ways and Means Committee of congress on November 3, 1919, that the prima facie presumption in regard to gifts "in contemplation of death" should be extended to six years and that "any transfer made within two years of the death of any decedent without consideration save and except love and affection, shall be conclusively presumed to be made in contemplation of death." This proposition is at least honest in its bald statement that the thing taxed is "love and affection."

As suggested in your editorial, "if the federal and state governments are to see which can get the larger part of an estate and each begins to create statutory presumptions for an increasing number of years before death as to the motives of transfer, a very serious complication is likely to arise. Was the taxing power created for any such purpose, either in the state or in the nation?" While the present statutory presumption covers only two years, the theory of the government in regard to the taxing power in this matter is not limited by any number of years. The motive of a transfer may be exactly the same whether it is made within two years or forty years of a man's death, as nobody knows whether he may slip on a banana peel and break his neck within twenty-four hours after any gift.

The only reasonable, constitutional interpretation of the words "in contemplation of death" seems to be confined to gifts *causa mortis* or other gifts involving some kind of reservation or postponement of interest directly connecting the ultimate and final transfer of complete possession and enjoyment with the fact of death.

That the Secretary of the Treasury in November, 1919, realized that the act of congress might not be "stretched" to extend beyond this is indicated by the fact that he suggested that congress should define the words "contemplation of death" so that they shall not "be limited and restricted to that expectancy of death which actuates the mind of a person making a gift *causa mortis*" as they are defined in the statutes of California, 1913 (chap. 595, sec. 1, subd. (f)). His other suggestions in regard to presumption are taken from the statutes of Nevada (1913, chap. 266, sec. 30); statutes of Wisconsin (chap. 48 b. sec. 1087); and Burns Ann. Indiana statutes (sec. 10143 a, subd. 4).

Whether those statutes have been or can be sustained in these different states, I do not know, but I suggest that they are bad law and worse policy and that the act of congress as it stands today cannot reasonably and constitutionally be construed, nor can it be amended so as to include the statutory definitions and presumptions of those states. Massachusetts, to her discredit, has begun to follow suit in this interesting competition between the states and the federal government in taxing generosity by an act of 1920 (Chapter 548), although it is only fair to say that that act does not go as far as some of the other states. The act has not yet been passed upon by the Massachusetts Court.

Is not this whole theory of the taxation of such gifts in these ways a disgusting abuse of the taxing power attempted by a sneaking definition?

There is another fact in regard to the relation of the clause covering gifts "in contemplation of death" to the administration of the estate tax law which should not be overlooked. The estate tax applies at progressive rates if the net estate amounts to $50,000 or more. The net estate is ascertained under the act by making certain specified deductions from the gross estate, and the gross estate is ascertained under the act and under the regulations by including any transfers "in contemplation of death." Accordingly, not only the rate of taxation upon the entire estate, but the question whether the estate tax applies at all may depend on the question whether there have been any transfers made by the decedent during his life and, if so, whether they can be included in the gross estate in law or in fact.

In this connection, it is interesting to turn to one of the New York cases in which the opinion at least clears away any artificial and hypocritical attempt on the part of the government to connect the tax with the death. The case is the matter of Hodges (215 N. Y. 447) decided in 1915, in which Chief Judge Willard Bartlett, in discussing the New York statute taxing gifts made "in contemplation of death," decided that such gifts shall not be added to gifts to the same person contained in the will for the purpose of increasing the rate of taxation. His reasoning was as follows:

> Under the express provisions of the tax law, the gift of bonds and securities to the wife was taxable as soon as it was made. As such gifts seldom become known to the taxing authorities until after the death of the person making them, there is usually no effort to tax them earlier; but this fact does not affect their liability to earlier taxation if ascertained. Where the transfers are thus distinct in character, one being a gift *inter vivos* taxable when made and the other a legacy taxable only upon the death of the testator, there appears to be no warrant in law for adding them together and considering them as one transfer.

If this is so as to the rate of taxation measured by the amount of legacies under the New York law, why is it not also true in regard to the federal law, and why does it not illustrate beyond any question the fact that there is no connection with the death in the theory of the tax, that it is a tax upon some gifts and not upon others, the only distinction being one of motive?

A man of any age may squander his money by showering gifts on disreputable women. The motive has nothing to do with death upon any reasonable interpretation of the facts. It is therefore, not taxable on the government's theory. But, if a man prompted by motives of love and affection and a desire to see members of his family or friends receive something during his life and enjoy it, makes gifts to them before he dies, it is "presumed" to be an evasion of the government's theory of a duty on the part of this sec-

ond man to keep the gross value of his property until his death and not give any of it away out of love and affection; although there is no duty on the governments theory on the first man above mentioned not to give away all the property he likes to all the women he likes. Such cases "evade" no duty to the government. A discrimination of this kind would seem to be sufficiently arbitrary to meet the requirements of the most fastidious court as an illustration of a point where the law says the government must stop.

F. W. GRINNELL.

60 State St.

Opposes Procedure Bill

Indianapolis, Ind., April 22.—To the Editor: The bill pending in the Senate to authorize (?) the Supreme Court to promulgate rules of practice in common law cases ought to be entitled: "A bill for an act to impair the obligations of contracts, destroy the stability of business engagements and promote the employment of lawyers at higher rates of compensation."

The bill has no other merit,—with apologies to the word "merit" for having used it in this connection.

Two premises are involved, namely:

1. The jurisdiction of Federal Courts in common law cases depends upon the citizenship and residence of the parties at the time the action is begun, but the *lex loci* of the contract remains constant, and to that purpose the Federal Courts judicially know the laws of all the states.

2. The procedure which the law gives for the rendition and enforcement of judgments on contracts is remedial and it constitutes a part of the consideration of the contract and cannot be impaired.

Each of these premises has been exemplified so often by the Supreme Court that both may be said to be commonplace.

The equity rules, the admiralty rules, the bankruptcy rules and such rules as the court from time to time may elect to make in respect of the Federal Criminal procedure are founded upon principles distinct from those which control in common law cases affecting contracts.

Fraud, accident and mistake, three of the sources of equity jurisprudence, are not contractual; nor are those acts contractual which the Criminal Code abhors. In admiralty and bankruptcy, the states are without jurisdiction, so that the *lex loci* cannot be said in the usual sense to be a part of the consideration of a maritime contract, while, on the other hand, the bankruptcy powers of the Federal government are an inchoate element, at least, of all contracts.

Aside from the bread and butter consideration, and it is unworthy, we ought to be thankful that the Senate has withheld from us the realization of our folly in supporting the pending measure.

WILLIAM VELPEAU ROOKER.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACT OF CONGRESS OF AUGUST 24, 1912,

of Journal issued by American Bar Association, published monthly at Chicago, Illinois, for April, 1921:

STATE OF SOUTH CAROLINA, } ss.
COUNTY OF KERSHAW, }

Before me, a notary public, in and for the state and county aforesaid, personally appeared Edgar B. Tolman, who, having been duly sworn according to law, deposes and says that he is the editor-in-chief of the Journal issued by the American Bar Association, and that the following is, to the best of his knowledge and belief, a true statement of the ownership, management (and if a daily paper, the circulation), etc., of the aforesaid publication for the date shown in the above caption, required by the Act of August 24, 1912, embodied in section 443, Postal Laws and Regulations, printed on the reverse of this form, to-wit:

1. That the names and addresses of the publisher, editor, managing editor, and business manager are:

Publisher, American Bar Association, W. Thomas Kemp, Sec., Baltimore, Md.

Editor, Edgar B. Tolman, 30 N. La Salle St., Chicago.

Managing Editor, Joseph R. Taylor (acting), 1612 First National Bank Bldg., Chicago.

Business Manager, Joseph R. Taylor (acting), 1612 First National Bank Bldg., Chicago.

2. That the owners are: (give names and addresses of individual owners, or, if a corporation, give its name and the names and addresses of stockholders owning or holding 1 per cent or more of the total amount of stock.)

American Bar Association (not inc.), William A. Blount, President, Pensacola, Fla.; F. E. Wadhams, Treasurer, 78 Chapel St., Albany, N. Y.; W. Thomas Kemp, Secretary, 901 Maryland Trust Bldg., Baltimore, Md.; W. O. Hart, Chairman General Council, 134 Carondolet St., New Orleans, La.

3. That the known bondholders, mortgagees, and other security holders owning or holding 1 per cent or more of total amount of bonds, mortgages, or other securities are: (If there are none, so state.)

There are none.

4. That the two paragraphs next above, giving the names of the owners, stockholders, and security holders, if any, contain not only the list of stockholders and security holders as they appear upon the books of the company but also, in cases where the stockholder or security holder appears upon the books of the company as trustee or in any other fiduciary relation, the name of the person or corporation for whom such trustee is acting, is given; also that the said two paragraphs contain statements embracing affiant's full knowledge and belief as to the circumstances and conditions under which stockholders and security holders who do not appear upon the books of the company as trustees, hold stock and securities in a capacity other than that of a bona fide owner; and this affiant has no reason to believe that any other person, association, or corporation has any interest direct or indirect in the said stock, bonds, or other securities than as so stated by him.

by him.

EDGAR B. TOLMAN.

Sworn to and subscribed before me this 26th day of March, 1921. C. H. YATES, Notary Public.

[SEAL.]

(My commission expires at will of Governor.)

(Continued from page 226)

HOTEL ACCOMMODATIONS IN CINCINNATI, OHIO

(All hotels European plan, except as stated. Prices named are per day.)

Name	Location	Single room and bath	Double room and bath
Hotel Gibson ..	4th and Walnut...	$2.50 up	$4.25 up
Hotel Sinton .	4th and Vine.....	3.50 up	5.50 up
Havlin Hotel..	Vine & Opera Pl..	3.00 up	5.00 up
Hotel Metropole	6th and Walnut...	2.50 up	4.50 up
Grand Hotel .	4th and Central...	2.50 up	4.00 up
Palace Hotel .	6th and Vine.....	2.00 up	3.00 up
Emery Hotel .	421 Vine	2.50	4.50
Hotel Alms .. (Amer. plan)	McMillan & Alms Place	4.00	7.00

Mr. Ben B. Nelson, Fourth National Bank Building, Cincinnati, Ohio, has charge of reservations for members and guests. In writing to Mr. Nelson please state:

a. Preference of hotels;
b. Time of arrival;
c. Period for which rooms are desired;
d. Whether single or double room desired;
e. How many persons will occupy each room.

Members who wish to do so are at liberty to make direct arrangements with hotel preferred.

OFFICERS AND COMMITTEES

(Continued from page 210)

Representatives of American Bar Association to Conference of Delegates.

HOLLIS R. BAILEY, Boston, Massachusetts.
JOHN H. VOORHEES, Sioux Falls, South Dakota.
EDWIN T. MERRICK, New Orleans, Louisiana.
LAWRENCE MAXWELL, Cincinnati, Ohio.
WILLIAM H. BURGES, El Paso, Texas.

Change of Date of Presidential Inauguration.

WILLIAM L. PUTNAM, Boston, Massachusetts.
WILLIAM L. MARBURY, Baltimore, Maryland.
NATHAN WILLIAM MacCHESNEY, Chicago, Illinois.
JOHN B. SANBORN, Madison, Wisconsin.
WILLIAM C. KINKEAD, Cheyenne, Wyoming.

Classification and Restatement of the Law.

JAMES DeWITT ANDREWS, New York, New York.
ADOLPH J. RODENBECK, Rochester, New York.
ROSCOE POUND, Cambridge, Massachusetts.
HARLAN F. STONE, New York, New York.
EUGENE C. MASSIE, Richmond, Virginia.
GEORGE P. COSTIGAN, JR., Chicago, Illinois.
EDWARD Q. KEASBEY, Newark, New Jersey.
ROBERT F. BLAIR, Tulsa, Oklahoma.
GEORGE B. ROSE, Little Rock, Arkansas.

Law of Aviation.

CHARLES A. BOSTON, New York, New York.
ORRIN N. CARTER, Chicago, Illinois.
WILLIAM P. BYNUM, Greensboro, North Carolina.
GEORGE G. BOGERT, Ithaca, New York.
WILLIAM P. MacCRACKEN, Chicago, Illinois.

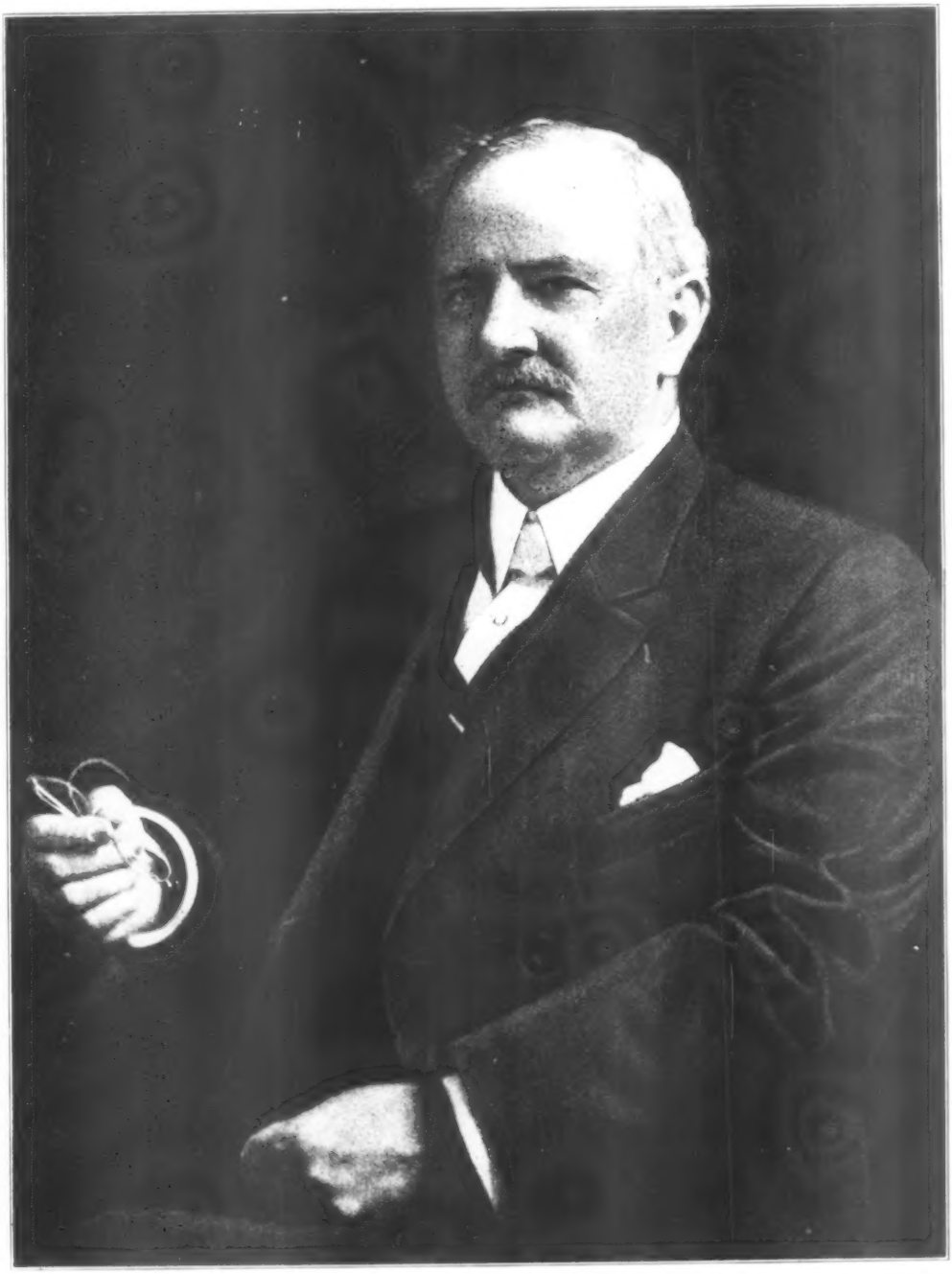
Legal Aid.

CHARLES E. HUGHES, New York, New York.
ERNEST L. TUSTIN, Philadelphia, Pennsylvania.
REGINALD HEBER SMITH, Boston, Massachusetts.
FORREST C. DONNELL, St. Louis, Missouri.
WILLIAM R. VANCE, New Haven, Connecticut.

TABLE OF CONTENTS

MEMBERSHIP

The Executive Committee in January approved the organization and Plan of the Membership Committee. That Committee is now composed of one member from each of the eleven membership districts into which the states and territories have been divided, together with the former Presidents of the Association, who are acting as an Advisory Committee. The organization provides for District Directors, State Directors and County Advisers, thus covering the field fully. County Advisers are entrusted with the important task of preparing a list of members of the bar in their counties who would be desirable recruits and, after the names receive the proper approval, of securing their applications. The project is important and will no doubt enlist the enthusiastic co-operation of the members of the Association.



WILLIAM ALEXANDER BLOUNT
Late President American Bar Association
Born October 25, 1851 *Died June 15, 1921*